

## REPORT DOCUMENTATION PAGE

Form Approved  
OMB No. 0704-0188

Public reporting burden for this collection of information is estimated to average 1 hour per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden, to Washington Headquarters Services, Directorate for Information Operations and Reports, 1215 Jefferson Davis Highway, Suite 1204, Arlington, VA 22202-4302, and to the Office of Management and Budget, Paperwork Reduction Project (0704-0188), Washington, DC 20503.

1. AGENCY USE ONLY (Leave blank)	2. REPORT DATE	3. REPORT TYPE AND DATES COVERED	
14 Mar 97			
4. TITLE AND SUBTITLE  Human Rights Enforcement: A Fundamental Duty of the Sovereign State		5. FUNDING NUMBERS	
6. AUTHOR(S)  Ellen Marie Englehart			
7. PERFORMING ORGANIZATION NAME(S) AND ADDRESS(ES)  Texas A&M University		8. PERFORMING ORGANIZATION REPORT NUMBER  97-010	
9. SPONSORING/MONITORING AGENCY NAME(S) AND ADDRESS(ES)  DEPARTMENT OF THE AIR FORCE AFIT/CIA, BLDG 125 2950 P STREET WPAFB OH 45433-7765		10. SPONSORING/MONITORING AGENCY REPORT NUMBER	
11. SUPPLEMENTARY NOTES			
12a. DISTRIBUTION AVAILABILITY STATEMENT  Unlimited		12b. DISTRIBUTION CODE	
13. ABSTRACT (Maximum 200 words)			
14. SUBJECT TERMS		15. NUMBER OF PAGES  84	
16. PRICE CODE			
17. SECURITY CLASSIFICATION OF REPORT	18. SECURITY CLASSIFICATION OF THIS PAGE	19. SECURITY CLASSIFICATION OF ABSTRACT	20. LIMITATION OF ABSTRACT

19970319 190

14. SUBJECT TERMS	15. NUMBER OF PAGES  84		
16. PRICE CODE			
17. SECURITY CLASSIFICATION OF REPORT	18. SECURITY CLASSIFICATION OF THIS PAGE	19. SECURITY CLASSIFICATION OF ABSTRACT	20. LIMITATION OF ABSTRACT

## **ABSTRACT**

**Human Rights Enforcement: A Fundamental Duty of the Sovereign State.**

(May 1997)

Ellen Marie Englehart, B.S., United States Air Force Academy

Chair of Advisory Committee: Dr. Manuel Davenport

Human rights enforcement is an important issue within international law.

Unfortunately, the status quo of human rights within international law is unsatisfactory.

Men, women and children suffer daily violations of their most fundamental human rights.

The international community and sovereign states stand by idly, and human rights violations continue unabated. The main impediment to human rights enforcement is state sovereignty.

If sovereignty can be abridged to the extent necessary for human rights enforcement, there may be hope for human rights within the international arena.

**DTIC QUALITY INSPECTED**

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**HUMAN RIGHTS ENFORCEMENT: A FUNDAMENTAL DUTY OF  
THE SOVEREIGN STATE**

**A Thesis**

**by**

**ELLEN MARIE ENGLEHART**

Submitted to the Office of Graduate Studies of  
Texas A&M University  
in partial fulfillment of the requirements for the degree of

**MASTER OF ARTS**

**May 1997**

**Major Subject: Philosophy**

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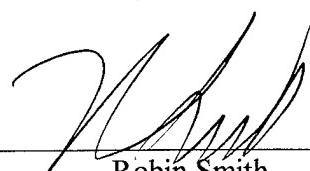
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Human rights enforcement is an important issue within international law.

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The international community and sovereign states stand by idly, and human rights violations continue unabated. The main impediment to human rights enforcement is state sovereignty.

If sovereignty can be abridged to the extent necessary for human rights enforcement, there may be hope for human rights within the international arena.

## **DEDICATION**

To my loving husband James; his love is unconditional.

He never lets me say never.

He reminds me that I can do anything.

To our families for their love and support.

To Kim for reminding me:

“What lies before you and what lies behind you  
are tiny matters to what lies within you” -Emerson

## ACKNOWLEDGMENTS

I would like to thank Dr. Manuel Davenport for his help and encouragement throughout the program. He never told me I couldn't do it when others were very eager to do so. Dr. C. E. Harris, Jr. was also very helpful in guiding my insights on Kant and Gewirth. Dr. Judith Baer offered help in style and content for the thesis as well.

I would also like to thank the Texas A&M Philosophy Department for helping me throughout the program. I gained a great deal of insight through my courses and interaction within the department. I hope to now share my excitement about philosophy with others through teaching and refusing to live an unexamined life. I owe a debt of gratitude to Captain Matthew Hallgarth and the U.S. Air Force Academy Department of Philosophy and Fine Arts for taking a chance and selecting me for the Graduate Studies Program.

My husband James was there for me throughout this year, and I couldn't have done it without him. He always knew I could do this, and he knew I would do it well. I owe him more than words could ever say. Thanks again to our families for their love and support.

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## CHAPTER 1

### INTRODUCTION

The status quo of human rights within international law is unsatisfactory. Men, women and children suffer daily violations of their most fundamental human rights. Genocide, torture and maiming are facts of life for far too many human beings. There must be a universal standard of human rights, and this standard must be enforced. Sovereign states can no longer stand by idly as other states violate the human rights of their own citizens. The problem encountered whenever dealing with enforcement within international law is the issue of sovereignty. Article 2(7) of the United Nations Charter presents a formidable challenge to any attempt by the community of nations or individual nations to interfere in the affairs of a sovereign state: Article 2(7) of the UN Charter “denied authority to the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state” (von Glahn 237). Hence, any proposed enforcement of human rights must fully address the issue of state sovereignty.

In order to overcome state sovereignty, I propose the principle of sovereignty forfeiture, where states are able to intervene in a state perpetrating gross violations of human rights. I define “gross” violations of human rights using Peter Berger’s account. Berger restricts the scope of human rights international claims to only the “‘grossest cases’ of abuse that infringe the minimal views of decency embodied in every major world cultural tradition” (Falk 143). Berger’s conception of serious human rights violations provides a

baseline for agreement on what constitutes a violation of fundamental human rights. The Universal Declaration of Human Rights (UDHR) is also important throughout the thesis. Unfortunately, the unsatisfactory status quo of human rights indicates that fundamental human rights must be established before there can be any hope of real adherence to the political and economic rights explicated in the Universal Declaration.

The principle of sovereignty forfeiture I propose establishes three measures of intervention; intervention is morally obligatory, morally permissible or morally impermissible. The principle of sovereignty forfeiture is based on Immanuel Kant's categorical imperative: "I ought never to act except in such a way *that I can also will that my maxim should become a universal law*" (Kant Groundwork of the Metaphysic of Morals 70). I interpret Kant's categorical imperative using Dr. C. E. Harris's division of the categorical imperative into the universalization principle and the means-end principle. The universalization principle holds that one's action must be able to be universalized to allow everyone else to perform that action, and the means-end principle requires that people be treated as ends in themselves, rather than as means to an end. These concepts are extremely important in developing my principle of sovereignty forfeiture. Specifically, a nation has a duty to intervene in the affairs of another sovereign state when that state perpetrates serious human rights violations because the state has forfeited its sovereignty by virtue of denying its citizens their fundamental human rights.

Alan Gewirth's explication of human rights also plays a central role throughout the thesis. Gewirth's Principle of Generic Consistency parallels Kant's categorical imperative: "*Act in accord with the generic rights of your recipients as well as of yourself*" (Gewirth

Human Rights 240). In addition to his Principle of Generic Consistency, Gewirth's formulation of a right is also crucial in explaining that one cannot possess human rights in any real sense unless others respect the possession of that right. According to Gewirth: "A has a right to X against B by virtue of Y," where A is the right-holder, X is the object of right, B is the respondent of the right or the person with a correlative duty, and Y is the "justificatory basis" or ground of the right (Gewirth Human Rights 220). Gewirth's explanation of the possession of a right and Kant's categorical imperative lay the foundation for the principle of sovereignty forfeiture.

The forfeiture of sovereignty must not be taken lightly. Only sovereign states can enforce human rights because international law is presently too weak to provide any real means of enforcement, and serious human rights violations demand that action be taken. Since the enforcement of human rights through the principle of sovereignty forfeiture falls to the sovereign states, sovereignty cannot be summarily denied. Sovereignty and human rights must find a balance because without government order, there can be no effective protection of human rights within a state. Hence, it is essential that intervention be undertaken only as a last resort in resolving human rights violations. The United Nations must remain intact as an integral actor within international law, and General Assembly agreements and resolutions must be pursued before a state even considers direct intervention in the perpetrating state.

Thomas Hobbes, an enlightened egoist, provides a sharp contrast to Kant. Hobbes holds sovereignty supreme and presents what I term the Hobbesian objection, namely that sovereignty cannot be denied under any circumstances. I defend the principle of

sovereignty forfeiture in light of the Hobbesian objection, specifying when intervention is obligatory, permissible and impermissible. In this way, intervention in state sovereignty is presented within a moral framework with specific guidelines. An international community where states surrender a certain amount of autonomy in exchange for international cooperation and security is the final topic of the thesis.

### **1.1 Objectives**

(1) *Presentation of the problem.* The problem is that international law does not enforce fundamental human rights. Reliance on the United Nations for enforcement of human rights is unrealistic given the status quo of human rights.

(2) *Presentation of the solution.* The solution is the principle of sovereignty forfeiture, where a state perpetrating serious violations of human rights forfeits its sovereignty, and other states have a duty under certain guidelines to intervene on behalf of human rights.

(3) *Dealing with objections.* The Hobbesian objection is that state sovereignty cannot be forfeited or sacrificed in any way because the sovereign state is supreme. Only the sovereign state can best serve the interests of its citizens. In addition, political realists object to any forfeiture of sovereignty. These two objections must be dealt with in order to present a viable solution for human rights enforcement.

## CHAPTER II

### INTERNATIONAL LAW AND HUMAN RIGHTS:

### A CRITIQUE OF THE STATUS QUO

Before rushing headlong into human rights definitions and arguments, let us first set the stage by considering a number of examples. Real people are suffering real human rights violations. Throughout this chapter, we will consider real examples because human lives are at stake. The examples provided below reveal only a handful of human rights violations occurring daily throughout the world.

“In April 1991, a 22-year-old Saudi woman arrived at Montreal’s Mirabel Airport and requested asylum on the ground of ‘gender-related persecution.’ She told authorities that if Canada forced her to return to Saudi Arabia, her life would be in danger. Her crime? Walking outside her home without being enveloped from head to toe in a black *chador*” (Bardach 123). Canadian officials initially rejected the woman’s plea for asylum because they couldn’t believe that women in present-day Saudi Arabia live as third-class citizens. The reality of human rights in the international arena is grim. Iranian religious fundamentalists beat women severely in the face for wearing make-up; Iraqi dictator Saddam Hussein unleashed lethal chemical and biological weapons on his own people, particularly the Kurds; Cuban authorities “necklaced” uncooperative citizens, placing burning rubber tires around their necks.

Beyond the above-cited example of “gender-related persecution,” women in Saudi Arabia and numerous other Islamic nations suffer daily other violations of human rights, rights considered fundamental by the United States and the majority of nations in the international community. Journalist Ann Louise Bardach noted only a few of the most

recent developments in the Muslim world regarding women: "In 1990, Iraq issued a decree effectively allowing men to kill their wives, daughters or sisters for adultery. In certain parts of the Muslim world, 'honor killings'--in which a father kills a wife or daughter believed to have dishonored the family are not uncommon" (Bardach 124). In the United States, killing a family member for committing adultery or merely dishonoring the family would be prosecuted under the criminal justice system as crimes of premeditated murder, but such killing is permitted in Muslim countries in the name of Allah, the Islamic God. Algerian Marie-Aimee Helie-Lucas, founder of the French-based advocacy group Women Living Under Muslim Laws, declared: "Islamic fundamentalism is a political movement, not a religious movement. It's the extreme right wing using religion as a cover. It is the fascism of today" (Bardach 125). Human rights violations in the Islamic world go without punishment because such violations are perpetrated under the guise of domestic affairs. Neither sovereign states nor the international community consistently condemn flagrant human rights violations. Within international law, there is no "line in the sand" regarding human rights violations.

Human rights violations occur everywhere, from Saudi Arabia to Cuba and even the United States. The examples cited clearly illustrate human rights violations. The international community watches idly as sovereign states brutally execute their own people. In a twentieth century filled with advanced technology and a continuously improving standard of living, the world witnesses human rights violations daily, testaments that this century is not so different from the Middle Ages in such respects. Our reaction must be to take action. What action? What can be done? If we can make the decision to act rather than observe, we have drawn a line in the sand. We will not tolerate the violation of human

rights. Within international law, the sovereign state must make this pledge of nontoleration.

The protection of human rights is a fundamental duty of sovereign states.

Perhaps individuals and states fail to realize the magnitude of human rights violations. Amnesty International reported serious human rights violations occurring in at least 116 countries in 1977 (Falk 153). The troubling reality behind this statistic is that the report cited only serious violations, rather than all human rights violations. Peter Berger defines serious human rights violations as the "grossest cases" of abuse infringing on minimal views of decency (Falk 143). Obviously, human rights must extend beyond only the minimal, but for now we must begin with the "grossest cases" and proceed further to economic and political rights.

Why should individuals, or even sovereign states, for that matter, concern themselves with human rights? Western countries, in particular, may fall prey to the bliss of ignorance. In fact, one may be able to go on from day to day without worrying about human rights violations. NIMBY, the "not-in-my-backyard" sentiment, summarizes how many Americans feel about human rights. "It's terrible, but it's not my business" would probably be a common statement collected from the "man on the street." Unfortunately, many sovereign states claim the same defense. Sovereign states worry that intervention in the "domestic" affairs of a fellow sovereign state may backfire in the long run: "Governments seem wary that the sword used against others today could be turned against them tomorrow" (Falk 153-154). Perhaps this is so, but if all states conducted themselves in good faith accord with basic human rights, there would be nothing to worry about in the way of future intervention from other states in the name of human rights.

On the most basic level, one might still ask why human rights are important. Why should I care about human rights? An anonymous author submitted the following internet post in response to the debate on freedom in America:

When they came for the Fourth Amendment, I didn't say anything because I had nothing to hide.

When they came for the Second Amendment, I didn't say anything because I didn't own a gun.

When they came for the Fifth and Sixth Amendments, I didn't say anything because I had committed no crime.

When they came for the First Amendment, I couldn't say anything (Apel).

At some point, human rights violations demand accountability by every individual. Though relating to the American Bill of Rights, the internet post is very relevant to human rights. If we don't take a stand against human rights violations now, it may be too late. From a purely egoist perspective, it is in our own self interests to protect human rights, or there may be no one to protect ours if such protection were ever necessary.

At one time, the international community may have been able to evade its responsibility to protect human rights under the guise of non-interference in the domestic affairs of sovereign states, essentially the NIMBY argument at the international level. This argument is nothing more than a weak excuse on the part of sovereign states to shirk their fundamental responsibility to protect human rights in the international arena. This fundamental responsibility devolves from a universal moral code common to all people, regardless of culture. The concern of international law should be codifying this moral code; to this end, the Universal Declaration of Human Rights represents an unequivocal step in the right direction. Professor Gerhard von Glahn noted, "Many writers, as well as the International Law Commission, have asserted that there exists a twelfth duty requiring *each* state to treat all persons in its jurisdiction with respect for their human rights and

fundamental freedoms, without distinction as to race, sex, language or religion" (von Glahn 187). Reflecting the growing majority view, the international community of sovereign states must accept enforcement of human rights as a fundamental duty and an essential first step in ending the rampant violations of human rights in the international arena.

## 2.1 What is a right?

"Human rights: this is an ambiguous term. Sometimes it means 'natural rights,' at other times it means rights that humans have, and at still other times it means moral rights" (Pojman 592). In an attempt to resolve this ambiguity, I suggest a number of definitions and explanations. In the most basic sense, rights allow us to act in a certain way. Without rights we would not have been able to perform such an act. Louis Pojman explains, "Rights give us special advantage. If you have a right, then others require special justification for overriding or limiting your right; and conversely, if you have a right, you have a justification for limiting the freedom of others in regard to exercising that right" (Pojman 592). Pojman provides the skeleton for our understanding of rights. We will explore other definitions and explanations of rights, specifically human rights, in order to construct a framework.

Definitions of rights abound, but by exploring various interpretations, an underlying understanding emerges. Immanuel Kant defines a right as intrinsic to the understanding: "Right can never be an appearance; it is a concept in the understanding, and represents a property (the moral property) of actions, which belongs to them in themselves" (Kant Critique of Pure Reason 83). Kant believes that an innate right is internal: "An innate right is that which belongs to everyone by nature, independently of any act that would establish a right . . . What is innately mine or yours can also be called what is *internally* mine or yours" (Gregor 30). Alan Gewirth defines rights as justified claims: "In the briefest compass, a

right is an individual's interest that ought to be respected and protected; and this 'ought' involves, on the one side, that the interest in question is something that is due or owed to the subject or right-holder as her personal property, as what she is personally entitled to have and control for her own sake; and, on the other side, that other persons, as respondents, have a mandatory duty at least not to infringe on this property" (Gewirth Community of Rights 9). Gewirth notes a pivotal aspect of a right. One cannot possess a right in any real sense unless others respect that person's possession of the right under consideration.

To this end, Gewirth provides the following formula of a right: "A has a right to X against B by virtue of Y" (Gewirth Human Rights 220). A is the subject of the right, or the right-holder; X is the object of the right; B is the respondent of the right, or the person with the correlative duty; and Y is the "justificatory basis or ground" of the right (Gewirth Human 220). Without the respondent (B), it would do little good for the right-holder (A) to claim right (X) even with the support of virtue (Y). Clearly, the respondent must perform his correlative duty in order for the right-holder to possess the right in any demonstrative sense.

"Rights" according to The Cambridge Dictionary of Philosophy are defined as "advantageous positions conferred on some possessor by law, morals, rules, or other norms. There is no agreement on the sense in which rights are advantageous" (Audi 695). Human rights in the most basic sense require that the life of one person be preserved. William A. Banner notes, "A right is a claim upon an intrinsic or instrumental good. This claim has its foundation in the human inclination to happiness, as indicated in the range of one's own interests and the interests of others" (Banner 154-155).

## 2.2 The notion of acceptance

Gewirth's definition of a right as a relationship between the right-holder and the respondent bearing a correlative duty underlies the notion of acceptance. The respondent's failure to perform the correlative duty explains a number of human rights violations, whether the respondent is an individual, a group or a government. The result remains the same; the right-holder is unable to exercise his right because the respondent either implicitly or explicitly denies the exercise of that right. Essential to human rights is the concept of recognition within the community. If human rights are not accepted within a given social structure, those rights do not exist for the members of the society denied such recognition: "The recognition of rights involves, in a sense, a readiness on the part of members of a community to accept the testimony of equals that such things as personal freedom, enlightenment, association, health, and physical security are goods which are prized as means to these ends" (Banner 155). This makes sense to anyone who has ever experienced a restriction of freedom. For example, a prisoner cannot roam about the world freely as he once may have been free to do. Through the conviction of a crime, this person forfeits his claim to certain rights and freedoms which a person outside the prison walls may take for granted. For the prisoner, the ability to move freely about the world simply does not exist in his sphere of influence. His domain lacks certain freedoms.

Like the prisoner living daily within limited bounds of freedom, the person denied human rights by his culture, government or social culture cannot function as the person living outside of such constraints might. In fact, the person denied human rights may not even know of the possibility of existence outside such limitations. "Social existence emerges as an *order* only where the distinction between right and pretension [to privilege] is

expressed in the structure of the laws and customs by which a people are governed. Social order is thus opposed to any scheme of unilateral arrangements in which the assertion of claims by one or more individuals precludes the assertion of corresponding claims by others" (Banner 155). This suggests that we seek to enforce a social order where the claim of one's rights do not interfere with another's basic claims to the same fundamental rights. Hence, "The foundation of any right is the status of the individual as a person, as the essence of any right is its universality in pertaining to all persons without restriction" (Banner 155).

Within any human structure of order, there must be a recognition of the basic claims of human rights. "One always possesses any specific right by virtue of possessing some status. Thus, rights are also classified by status. . . . human rights are possessed by virtue of being human" (Audi 695). Human rights must exist independently of societal context, at least in the basic sense. "Human rights are still thought of as natural in the very broad sense of existing independently of any human action or institution" (Audi 695). With such an understanding firmly in place, it becomes the responsibility of the state to educate its people and enforce human rights, at least in the basic sense, and eventually to even greater degrees.

Gewirth's formulation of what it is to have a right becomes very useful when dealing with duties, violations and absolute rights. Gewirth provides an extensive analysis of right and right violation useful to bear in mind when dealing with human rights and corresponding duties of the sovereign state. Gewirth explains, "A right is *fulfilled* when the correlative duty is carried out, i.e., when the required action is performed or the prohibited action is not performed. A right is *infringed* when the correlative duty is not carried out, i.e., when the required action is not performed or the prohibited action is performed"

(Gewirth Human Rights 219). A right justifiably infringed is *overridden*, but a right unjustifiably infringed is *violated* (Gewirth Human Rights 219). Gewirth's explanation of rights provides a firm foundation building on Kant's conception of possessing a right innately. Our conception of rights will indubitably grow in complexity as we add successive layers to our foundation. This foundation is grounded in Kant and Gewirth and their explications of right. As a foundation, *a right is a justified claim that one possesses in relation to a respondent (individual, group or government)*.<sup>1</sup>

### 2.3 What is a fundamental duty?

In order to understand the necessity for human rights as a fundamental duty of the sovereign state, one must first define the terms of the argument. Given our enlightened understanding of rights, we can now proceed to define what we mean in stipulating that the state has a fundamental duty to enforce human rights. The most basic precept of the argument is that the enforcement of human rights is defined as a fundamental duty.

Professor von Glahn defines a duty as "the existence of a moral code prevailing in the

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<sup>1</sup> I will take rights to be equivalent to positive rights, carrying the responsibility of action rather than noninterference. A negative right is the right not to have something done to one, for example the right not to be tortured. A positive right is the right to perform certain actions, for example, the right to vote. The problem with negative rights is that the corresponding duty of the respondent is inaction or noninterference. Let us consider the example of a lifeguard watching swimmers in a local pool. The lifeguard is on duty and has a duty to rescue a drowning swimmer. If the lifeguard jumps into the pool in a fit of rage and drowns a swimmer, he clearly has engaged in commission, leading to the death of one of the swimmers. What if the lifeguard notices one of the swimmers struggling in the water at the deep end of the pool and decides to take a break at that moment, knowing that the swimmer needs assistance? The lifeguard has now contributed to the death of a swimmer through omission (assuming the struggling swimmer does not receive any assistance). The lifeguard example underscores the problem endemic to the construction of a moral theory based on negative rights. Underlying negative rights is the concept of noninterference. Like the lifeguard example, noninterference can result in the same end as direct involvement. The lifeguard is no less culpable in the swimmer's death where he noticed a struggling swimmer, knew there was no other available assistance for the drowning swimmer, then casually walked away. Each individual, group and government which does not take action in mitigating human rights violations is very much like the lifeguard in the example. The only difference is that in the case of human rights, governments invariably claim the inability to intervene in the affairs of another sovereign state. I stipulate rights to be the equivalent of positive rights, requiring action rather than noninterference for individuals, groups and governments.

relations among nations" (von Glahn 170). Gewirth notes, "A duty is a requirement that some action be performed or not be performed" (Gewirth Human Rights 219). Literally, fundamental appeals to one's innate sense of understanding. Air, water, food and shelter are fundamental to a human being's existence. In The Metaphysics of Morals, Kant defines duty as "that action to which someone is bound. It is therefore the matter of obligation, and there can be one and the same duty (as to the action) although we can be bound to it in different ways" (Gregor 15).

Beyond moral theory, international law incorporates the concept of duty within its most fundamental precepts. Much of international law is subject to controversy and debate, but the existence of duties of the state is grounded in customary international law as well as formal international treaties and agreements. Professor von Glahn referred to Machiavelli, a practicing diplomat, in citing that "some sort of [moral] code does exist" (von Glahn 170). International law is itself what produces the controversy, but few would dispute the presence of fundamental duties governing the sovereign state. In an attempt to dissipate some controversy, the duties of the sovereign state have been codified. von Glahn further noted, "The most modern, though incomplete, listing of the asserted duties of states may be found in the Draft Convention on the Rights and Duties of States, prepared in 1949 by the International Law Commission in conformity with a resolution of the United Nations General Assembly" (von Glahn 170). Eleven duties have been formally recognized by the majority of sovereign states as binding on sovereign states in their dealings with other nations. These duties include: (1) "the basic obligation of a state to abstain from intervention in the internal and external affairs of any other state" (von Glahn 170); (2) "the

obligation to refrain from fomenting civil strife in the territory of another state and to prevent the organization within its own territory of activities calculated to produce such civil strife" (von Glahn 180); (3) "make certain that the conditions prevailing in its territory do not menace international peace" (von Glahn 181); (4) "technically applicable only to the members of the United Nations under Article 2(3) of the UN Charter, is an obligation to settle international disputes by peaceful means" (von Glahn 181); (5) "Corollary to the fourth duty is an asserted fifth one, a duty to abstain from resort to war as an instrument of national policy and to refrain from the threat of the use of force against another state" (von Glahn 181); (6) "applicable to all members of the United Nations, is to refrain from giving assistance to any state against which the United Nations is taking preventive or enforcement action" (von Glahn 181); (7) "apparently under Article 2(4) of the UN Charter and binding only on the member states of the United Nations, is to abstain from recognizing any territorial acquisitions made by a state acting in violation of the Charter's provisions" (von Glahn 181); (8) "all states to carry out in good faith the obligations arising out of treaties and other sources of international law, and no state may invoke provisions in its constitution or laws as an excuse for failure to carry out this duty" (von Glahn 182); (9) the duty of each state of "conducting its relations with other countries in accordance with international law" (von Glahn 182); (10) "of quite modern origin, is an obligation by a state to see to it that no acts are performed in its jurisdiction that in some manner pollute the waters or the air of a neighboring state or the high seas" (von Glahn 182); (11) "a duty to prevent chemical (especially toxic) industrial spills into coastal waters and inland rivers" (von Glahn 187). Interestingly, duties ten and eleven, pertaining to environmental protection, enjoy

acceptance as fundamental duties, while the duty of human rights enforcement remains controversial. Professor von Glahn explains this tenuous situation:

Many writers, as well as the International Law Commission, have asserted that there exists a twelfth duty requiring *each* state to treat all persons in its jurisdiction with respect for their human rights and fundamental freedoms, without distinction as to race, sex, language, or religion. This duty cannot, however, be admitted as yet to exist on a general basis, no matter how admirable it may be from a moral point of view. The undoubted drastic degree of intervention in essentially domestic affairs of states in the application of this duty gives rise to this doubt as to the existence of the duty itself. It may well be that at some future time it may be accepted by the majority of the members of the community of nations and may be implemented by appropriate domestic legislation. But even granting such internal compliance with the duty, the question of enforcing it will have to be resolved before it can be maintained that this asserted duty is in effect and consequential in nature (von Glahn 187-188).

The protection of human rights is the twelfth duty of sovereign states.

## 2.4 Human rights and human rights violations

The term fundamental duty has been clearly defined, at least within the basic meaning of international law, but the term human right is equally important as a foundation for argument. University of Southern California Professor Alison Renteln noted, “The classic definition of a human right is a right which is universal and held by all persons: ‘A human right by definition is a universal moral right, something which all men, everywhere, at all times ought to have, something of which no one may be deprived without a grave affront to justice, something which is owing to every human being simply because he is human’” (Renteln 47). Wasserstrom’s (1964) definition of a human right notes, “Any true human right, it is said, must satisfy at least four requirements:

First, it must be possessed by all human beings, as well as only by human beings. Second, because it is the same right that all human beings possess, it must be possessed equally by all human beings. Third, because human rights are possessed by all human beings, we can rule out as possible candidates

any particular status or relationship, such as that of parent, president, or promisee. And fourth, if there are any human rights, they have the additional characteristic of being assertable, in a manner of speaking, ‘against the whole world’” (Renteln 47).

These definitions of human rights assert that these rights are universal in nature, and individuals literally have a duty to assert their human rights if the state will not. Specifically, I define the basic human rights, such as the right to life, as absolute rights. Referring again to Gewirth, “A right is *absolute* when it cannot be overridden in any circumstances, so that it can never be justifiably performed” (Gewirth Human Rights 219). I restrict absolute human rights to refer only to the most basic rights, meaning the right to life and such associated rights as the right not to be tortured and the right not to be maimed, rights obviously necessary to possess the right to life in any meaningful sense.

In order to clarify this basic conception of human rights, I refer to modern conceptions of basic human rights. In the end, I use Berger’s model as a reference of basic human rights, referring to violations as only those of the “grossest” nature, and I hold the Universal Declaration of Human Rights (UDHR) to be the model for human rights in the future. I do not feel that it is possible to start with the Universal Declaration at this point because the most basic human rights, such as the right to life, must be enforced before attempting to provide economic and political rights.<sup>2</sup>

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<sup>2</sup> Harold Titus and Morris Keeton provide the following list of the most basic rights of man. Prior to this listing, Titus and Keeton note, “They [the following ten rights] appear to be necessary conditions for human development” (Titus 257). Titus and Keeton list the following ten rights in their conception of basic human rights: (1) The right to health; (2) the right to education; (3) the right to freedom; (4) the right to work and receive a living wage; (5) the right to security; (6) the right to love and a home; (7) the right to recreation and to leisure; (8) the right to share in controlling the conditions of life; (9) the right to share in the cultural heritage of the race, including art and literature; and (10) the right to worship (Titus 258-260). Undoubtedly the world would be a better place if governments provided their citizens with the Titus-Keeton basic human rights. Unfortunately, the Titus-Keeton listing of basic human rights is not a realistic goal for sovereign state enforcement given the status quo of human rights. I turn to Fouad Ajami for a more basic

Armed with a basic understanding of what the fundamental human rights are, we must now define human rights violations. Undoubtedly we all have some understanding of what constitutes a human rights violation, but I adhere to only the most basic definition, considering the “grossest cases” of these violations, the definition provided by Peter Berger. Richard Falk provides a listing of the categories of severe human rights violations, which identifies basic human rights, but Berger’s listing provides the best baseline for minimal human rights enforcement. Falk lists the following categories of severe human rights violations: (1) genocide; (2) official racism; (3) large-scale official terrorism; (4) totalitarian governance; (5) deliberate refusal to satisfy basic human needs; (6) ecocide (environment); (7) war crimes (Falk 159).<sup>3</sup>

Peter Berger’s account of human rights violations restricts the scope of human rights international claims to the “‘grossest cases’ of abuse that infringe the minimal views of decency embodied in every major world cultural tradition” (Falk 143). Berger includes the following as violations of basic human rights:

Genocide; the massacre of large numbers of innocent people by their own government or by alien conquerors; the deliberate abandonment of entire sections of a population to starvation; the systematic use of terror (including torture) as government policy; the expulsion of large numbers of people from their homes; enslavement through various forms of forced labor; the forced separation of families (including the taking away of children from their parents by actions of government); the deliberate desecration of

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conception of basic human rights. Ajami emphasizes the link between the war system and human rights in arriving at his listing: “He argues that matters of survival (rather than liberty, or even equity) provide the ‘domain’ within which ‘the fate of human rights will be determined’” (Falk 144). Ajami believes his listing of the basic human rights embodies “the maximum feasible consensus at this time” (Falk 144). Ajami lists the following four rights as his most basic: (1) the right to survive; (2) the right not to be subjected to torture; (3) the condemnation of apartheid; and (4) the right to food (Falk 145). Ajami’s move to consider the most basic of human rights is the right decision when dealing with the status quo of human rights.

<sup>3</sup> Falk notes that items 5 and 6 are not at the same level of international agreement as the others.

religious symbols and persecution of those adhering to them; the destruction of institutions that embody ethnic identity (Falk 143).

We now have a better idea of how to definitively grasp what is meant by these ambiguous terms. We will use Berger's account as our baseline reference for human rights violations.

## 2.5 Definitional difficulties

Armed with our foundational understanding of rights, duties, human rights and human rights violations, we can now explore the problems plaguing a definitive approach to human rights at the international level. John P. Humphrey, Director of the Division of Human Rights of the United Nations, 1946-1966, noted in his 1973 "The International Law of Human Rights in the Middle Twentieth Century" essay: "In the United Nations, when the Universal Declaration of Human Rights was adopted, first importance was still given to the rights of the individual as such. The present tendency is to give more importance to the rights of groups and of the collectivity, sometimes to the disadvantage of the individual" (Lillich 11). Human rights refers to the individual and the group, but as Humphrey noted, the reality is that the group may be favored over the individual for purposes of expediency. This should come as no surprise to Americans accustomed to rule by the majority. The minority, or the individual in the case of human rights, may not share the opinion of the majority, or group with regard to human rights, but the international community would do well to begin by recognizing the rights of collective groups, and individuals claims can be considered later. It is of the utmost importance that the concept of human rights first be recognized before distinctions between individual and group human rights are considered.

Yet another problem in defining human rights is that different nations have different notions about accepting any universal declaration of human rights. According to Professor

Renteln, ". . . many of the [human rights] notions resemble Western European and American political ideas: *Everyone* has the right to: life, liberty and security of person (Article 3); recognition everywhere as a person before the law (Article 6); freedom of movement . . . to leave any country, including his own (Article 13); a nationality (Article 15); freedom of thought, conscience and religion (Article 18); freedom of peaceful assembly and association (Article 20); take part in the government of his country (Article 21). *No one* shall be: held in slavery (Article 4); subjected to torture (Article 5); subjected to arbitrary arrest, detention or exile (Article 9)" (Renteln 31). The Universal Declaration of Human Rights seems clear enough about what the fundamental human rights of mankind are, but the application of these declared rights has illustrated that no matter how unambiguous a document may be on an issue, interpretations will differ depending on the sovereign state.

Interpretations of human rights, even when spelled out as clearly as in the Universal Declaration of Human Rights, differ because each sovereign nation perceives the world through a different cultural paradigm. For example, the idea of protecting human rights encounters little outright resistance. Milton Meltzer noted, "When the Universal Declaration of Human Rights was adopted in 1948 by the General Assembly of the new United Nations, it was without dissent. In the decades since 1948, almost every new nation has joined in supporting the Universal Declaration" (Meltzer 11). Although the concept of human rights is one which no government would dare publicly oppose, the reality is that human rights violations occur in every sovereign nation. An example of the role of interpretation in applying human rights is found in the socialist states. Milton Meltzer commented, "To them [socialist states], the views of human rights in such countries as

Great Britain and the United States appear to be too general and abstract" (Meltzer 12). Socialist states interpret human rights to mean "the right to adequate food, shelter, housing, education and work" (Meltzer 12). Socialist states believe that the only way to provide for such needs is through a socialist system of providing for the collective whole, rather than the individual. Hence, socialist states provide a different view of human rights.

Third World nations, also referred to as developing nations, perceive human rights in yet another way. Similar to the Socialist view, Third World nations focus on collective human rights as opposed to individual rights. As Milton Meltzer noted, "Their [Third World nations] attention is focused on the basic necessities of survival in the face of the famine which threatens so many of the less-developed countries. . . . The rights of individuals, so prominent in the West, seem relatively less important to Third World nations facing the elemental challenge of survival" (Meltzer 12). When one considers what struggles these nations are attempting to overcome, their interpretation of human rights is very logical. Many Third World countries are striving to survive in the wake of antiquated colonial structures abandoned by imperial powers. Racial discrimination, once simply a matter of life, is a human rights violation with which these newly liberated nations are struggling to rectify. As Oxford Fellow R. J. Vincent noted, ". . . the non-western world does not necessarily share western values" (Vincent 37). Defining human rights may seem relatively simple to the Western culture, but one must understand that the cultural paradigms of socialist states, developing nations and others differ substantially from the West. Imposing human rights as a fundamental duty of all states means that these cultural paradigms must conform to the protection of human rights, stressing collective and individual human rights.

Clearly the Third World has a very different perspective on human rights than first world nations. Economics plays a key role, but the governmental structure is even more important. In most Third World nations, militarized politics exerts oppressive rule. As Richard Falk notes, “. . . the integration of society by the bureaucratic state is itself coercive to a degree. In the circumstances of many Third World countries lacking a recent tradition of political competition, the mere structure of state power creates a strong disposition toward repression, especially given the diversity of antagonistic ethnic elements contained within many Third World state boundaries” (Falk 128). One might be tempted to suggest the adoption of capitalism and Western views by Third World nations struggling under such oppression.

The problem with capitalism in Third World nations is that there is no way to control the resulting permutations in socialism and militarized politics. In most cases, the rich become richer, and the poor become poorer. The human rights violations worsen: “On balance, it still seems appropriate to argue that, except in very unusual domestic circumstances, socialism is a precondition for human rights in the Third World, whereas capitalism assures their massive denial” (Falk 136). Falk’s claim does not, however, assert that socialism is the best answer. Permutations in any existing form of government may come at a heavy cost: “. . . in practice the shift to socialism may entail severe transition costs that outweigh its greater equity of operation once established . . .” (Falk 136).

What is the solution to these problems? Although human rights violations occur in both First and Third World nations, the instability and frequently militarized politics of Third World governments often become “breeding grounds” for human rights violations. Peter Berger argues that we must strike such political talk from our vocabularies if we hope

to make real headway in the arena of international human rights. Berger's definition of human rights violations limits itself to only those "grossest" violations of minimal human decency. Perhaps in limiting talk on human rights to such basic considerations, many of the issues stalemating agreement between the First and Third World can be resolved: "Berger argues strongly that much of the debate on human rights is flawed by its failure to draw a clear distinction between ethnocentric and 'fundamental' human rights; only the latter are sufficiently legitimated by underlying cultural values to support an international stature" (Falk 143). Ethnocentric aggression must retreat if human rights are to gain any real support on the international level: "It is necessary, Berger argues, to reject those claims of right that owe their origins to Western values, and, in effect, to ignore even those rights incorporated in international legal instruments that cannot pass the test of cultural resonance" (Falk 143). Surrendering ethnocentricity will not be easy for the West, but such action is necessary if there is to be any common ground between First and Third World nations on the issue of human rights.

## **2.6 Human rights within international law**

Now that the terms fundamental duty and human rights have been adequately defined, one must examine how human rights presently fit into the modern world of complex international relations. Former Director of the Division of Human Rights of the United Nations John P. Humphrey commented, "The principal characteristic of the twentieth century approach to human rights has been its unambiguous recognition of the fact that all human beings are entitled to the enjoyment not only of the traditional civil and political rights but also of the economic, social and cultural rights without which, for most people, the traditional rights have little meaning" (Lillich 11). Professor Lillich's insight is

that the issue of human rights is complex in that fundamental human rights pervade every pore of a culture. It is not enough that a sovereign state has free elections if certain classes are not allowed to vote. How does Professor Lillich's view of human rights fit into the reality of civil disputes, perhaps the most common scene of human rights atrocities?

Hague journalist Robin Knight related the tale of Simon, a Croat, in the Omarska concentration camp located in northwest Bosnia. In the summer of 1992, Simon was removed from his cherry garden and sent to Omarska to be brutally interrogated for months by Serbs. ". . . he [Simon] was confined with 300 others in a garage and forced to kneel, head bowed, for six hours a day. Anyone who raised his head was knocked senseless. In the evenings new guards arrived, lined people against a wall and smashed them to death. About 15 men were killed each night" (Knight 52). Months later, Simon recalled, "It's an indescribable sight to see men beaten to pulp, coughing blood, dying" (Knight 52). Fortunately Simon's was not another tale of unpunished injustice in the civil strife of former Yugoslavia.

The United Nations war-crimes tribunal in The Hague, established by the United Nations Security Council in 1993, has been gathering evidence to prosecute those guilty of the slaughter and torture of innocents witnessed by Simon. The tribunal's chief prosecutor, Richard Goldstone, commented, "The criterion of success or failure must be whether there is a degree of justice that makes it worthwhile" (Knight 53). The success of the tribunal will represent a precedent: "To have a body of humanitarian law, built up over decades and accepted by the great majority of UN member states, without an enforcement mechanism is a fruitless exercise," noted Goldstone, a South African judge experienced in political violence investigations (Knight 53). Unfortunately, much violence in former Yugoslavia

still demands accountability. For example, a local Colorado newspaper reported yet another murder; "A French peacekeeper was killed in Sarajevo on Friday [14 April 1995] as other U.N. forces were fired on, robbed or reduced to using mules for transportation. French Premier Edouard Balladur demanded that the United Nations find and punish the killer of the soldier, who was shot in the neck . . ." ("French Peacekeeper Slain in Bosnia A10). The murder of the French peacekeeper illustrates perfectly the present state of affairs with regard to international human rights. The issue of human rights can no longer be claimed as a strictly domestic issue when the bloodshed of such violence is literally spilling over into the domestic affairs of other sovereign nations. Simon, the Croat, who witnessed numerous human rights atrocities at the hands of his Serb captors, could not insist that the violence be ended in the name of state boundaries. Especially in cases such as the former Yugoslavia, where the definition of sovereign states becomes muddled, human rights must be imposed as an international duty, not a subjective goodwill gesture of individual nations.

The ongoing problem with human rights as a fundamental duty of the sovereign state is that some nations, especially third-world countries, perceive international attempts to impose respect for human rights as a violation of the most basic duty of states, the obligation of a state to abstain from unlawful intervention in the affairs of any other state. The US- and Canadian-trained interim police force in Haiti encountered brutal, though expected, norms of brutality; Merchant Sylva Joseph, 65, explained, "When you arrest a thief, you have to beat him" (Katel 40-41). The soldiers avoided making waves, but the international community must make waves if the human rights violations, which have become the norm in some sovereign states, are to be stopped. A Cuban religious revival has recently surfaced in reaction to Fidel Castro's autocratic government. Gladys Santana,

21, was an atheist until last year when she yielded to the “subversive” Methodist church in central Havana; “If Jesus is with us, who could be against us?” Santana said (Masland 30). Cuban Foreign Ministry official Homero Saker explained the government’s position on the religious revival, “We think they are traitors to our people, annexationists” (Masland 30). In fact, the church was once “counterrevolutionary” in Cuba, but widespread support for religion has left Castro with little choice but to tolerate the movement. Cuba’s religious revival stands as an encouraging example of what can be done with concerted, mass support. The adage of strength in numbers is very true when confronting human rights violations. If Cuban citizens, who once feared professing any religion but atheism, can come together to overcome Castro’s religious ban, then the international community can most certainly come together to protect the human rights.

## **2.7 The Universal Declaration of Human Rights (UDHR)**

The Universal Declaration of Human Rights is a definite step in the right direction in securing human rights as a duty of the sovereign state through mass support. The Universal Declaration of Human Rights is referred to simply as “the central document for the cause of human rights,” according to Professor Alison Renteln (Renteln 27). Professor Renteln pointed out that the Declaration was adopted on 10 December 1948, but all drafts submitted to the Human Rights Commission originated in the democratic West, and all but two of the eighteen drafts submitted were in English (Renteln 28). This is a significant fact since the Declaration of Human Rights, preceded by the term *universal*, meaning that it would apply to all sovereign nations, was limited to the inputs of Western democracies. Despite the argument that the Declaration is not binding on nonsignatories and non-Western democracies, Professor Renteln explained, “The dominant view now is that the UDHR

[Universal Declaration of Human Rights] constitutes the authoritative interpretation of the human-rights provisions of the UN Charter. As such, it is legally binding on member nations" (Renteln 29). Professor Renteln also noted the applicability of the Declaration through customary international law: "Another widespread position is that the norms of the UDHR have become binding as part of customary international law, legal principles of the so-called civilized nations. This makes the standards applicable to all nations, whether or not they have expressed consent" (Renteln 29). This understanding is essential since South Africa and the Soviet Union initially refused to sign the Declaration because they believed that such an act would prevent them from being bound by its contents. Fortunately the Communist States later accepted the Universal Declaration in 1975 in the Final Act of the Helsinki Conference (von Glahn 238).

Though the Universal Declaration is still the subject of debate regarding its status within international law, its necessity cannot be disputed. Professor von Glahn notes, "... the Declaration had to be considered an expository interpretation of the Charter's very general human rights provisions, and those provisions represented, at least in theory, binding obligations on all member states . . . marking a definite advance toward the realization of human rights, on a global basis . . ." (von Glahn 238). Professor von Glahn holds that not all of the UDHR can be considered customary international law. Indeed such a claim would be far too sweeping, given the reality of human rights violations in the modern world; however, von Glahn does support customary international legal status for the most basic human rights within the Universal Declaration: "... *some* rights listed in the Declaration (such as freedom from torture, slavery, murder, etc.) are parts of customary international law" (von Glahn 238). The UDHR accepted a heavy mantle in taking the

burden of protecting human rights upon its shoulders. The lofty ideals addressed within the Universal Declaration cannot be taken lightly. Millions of men, women and children the world over depend on the enforcement of their human rights through the UDHR for their very lives.<sup>4</sup> Unfortunately, the UDHR is presently an inadequate tool for the enforcement of human rights.

## **2.8 Enforcement of human rights**

Enforcement of the Universal Declaration of Human Rights is the issue with which any nation truly serious about protecting human rights on an international scale must contend. It is not enough that the Universal Declaration is in existence. This declaration was signed in 1948 in conjunction with the birth of the new United Nations. Enforcement lies in sovereign nations realizing that their duty to maintain human rights will be externally motivated if internal motivation to provide for these rights is not sufficient. Oxford Fellow Loren Lomasky explained, “There does not seem to be any great resistance to holding that *duties or obligations* typically have an external source. One can have duties with respect to parents or benefactors *because* that relation obtains. And, of course, the existence of other rights holders thereby entails the obligation to respect their rights” (Lomasky 153). Lomasky noted that it would be preferable that sovereign states uphold human rights as an *internal* as opposed to an *external* duty, but such an expectation would be extremely unrealistic. Another weakness of the Universal Declaration is that it cannot fully be

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<sup>4</sup> Undoubtedly the Universal Declaration’s impact will not be forgotten. The President of the United Nations General Assembly declared at the 10 December 1948 adoption of the UDHR: “It is the first occasion on which the organized community of nations has made a declaration of human rights and fundamental freedoms, and it has the authority of the body of opinion of the United Nations as a whole, and millions of men, women and children all over the world, many miles from Paris and New York, will turn for help, guidance and inspiration to this document” (Green 34-35).

considered customary international law: "Being merely a declaration, it possessed no legally binding force, being comparable in this respect to the hortatory clauses found in some of the older state constitutions in the United States" (von Glahn 238). Sovereign states are not likely to take up human rights as an internal duty, especially in the absence of customary international status of the Universal Declaration. Unless enforced, the UDHR is not helpful in addressing human rights violations.

The key to enforcement then lies in an external source. The most widely accepted and highly reputed external source of international law is the United Nations. Since enforcing human rights on other sovereign states is the duty of every nation in the international community, the United Nations is the best source of enforcement. The argument that human rights enforcement violates the most fundamental duty of the state, that of the obligation not to interfere in the external or internal affairs of another sovereign, has been clearly rejected in that non-interference and human rights maintenance can coexist. The duty to protect human rights is founded on moral code and cemented in international law through the very precepts of the United Nations Charter and the Universal Declaration of Human Rights. When human rights are not in jeopardy, the international community of sovereign states has the fundamental duty not to interfere in the domestic and foreign affairs of another sovereign state; however, the violation of human rights, especially where the conflict spills over the borders of the violating state, terminates the duty of non-interference by other nations. Sovereign nations, especially those bordering on violating states, must take action to end human rights violations. These bordering states have a vested interest in conflicts involving human rights when such conflicts enter their own territory. The violating

state has lost its ability to claim non-interference because its domestic dispute has directly interfered with the domestic affairs of its bordering neighbor states.

Sovereign states, whose borders are not directly affected by human rights violations, also cannot shirk the responsibility to uphold human rights throughout the international arena. These sovereign states, which are third parties to human rights violations, cannot independently confront the violating state. The third party nation's borders and territory have not been violated by the human rights conflict, but the duty to uphold human rights still exists. This dilemma must be resolved through the United Nations, the community of sovereign states. The third party nation must enlighten the United Nations on the human rights transgressions of the violating state. The UN can then impose sanctions and/or deploy peacekeeping forces to the violating state in an attempt to end the human rights violations.<sup>1</sup> In the cases of both the bordering nation of a violating

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<sup>1</sup> J. E. S. Fawcett, a participant in the Nobel Foundation Symposium *International Protection of Human Rights* linked human rights with the right of self-determination, a further argument for UN enforcement of human rights. Fawcett, from Oxford University, noted, "The U.N. Charter, in Art 1(2) and 55 , treats self-determination as a directive principle. . . . The Universal Declaration does not speak directly of self-determination but it declares that the will of the people shall be the basis of the authority of government (Art. 21 (3)), and that everyone is entitled to a social and international order, in which the rights and freedoms declared can be realized (Art. 28)" (Eide 95-96). Fawcett explained the direct correlation between self-determination and human rights citing, "Again General Assembly Resolution 637A-VII (16.12.1952) declared that 'the right of peoples and nations to self-determination is a prerequisite to the full enjoyment of all fundamental human rights'" (Eide 96). Basing the existence of human rights as a duty on this correlation with the widely-accepted duty of self-determination, one must again return to the issue of enforcement.

Fawcett noted that human rights maintenance is a prerequisite to the existence of self-determination as a fundamental duty: ". . . the right of self-determination may, it seems, be enforced through the Human Rights Committee equally with other covenanted rights; and this conclusion is confirmed by the provision of Art. 7 of the Optional Protocol" (Eide 97). The United Nations has a duty to protect human rights in the international arena, as it has the obligation to maintain other fundamental rights through peacekeeping deployments. Fawcett concluded, "By treating self-determination as equivalent to other recognized human rights, the U.N. can draw upon those political emotions and forces which the Universal Declaration and Covenants have so effectively focused on human rights . . ." (Eide 98). Thus, the United Nations stands as the enforcement mechanism for the fundamental duty of human rights.

state and the “third party state,” the duty to uphold human rights in the international arena remains the same. The only difference is in resolving the human rights conflict with the violating state.

The international community may have once been able to evade its responsibility to protect human rights under the guise of noninterference in the domestic affairs of sovereign states. This argument is nothing more than a weak excuse on the part of sovereign states for not seizing their fundamental responsibility to protect human rights in the international arena. The international community of sovereign states must accept human rights as a fundamental duty as an essential first step in ending the rampant violations of human rights in the international arena. The largest obstruction in maintaining human rights as a fundamental duty of the sovereign state is the sovereign state itself. For this reason, an external source of international enforcement is necessary. The United Nations is this enforcement mechanism. When sovereign states become internally accountable for maintaining human rights within their borders, such an external enforcement body will not be necessary; until that time though, the flagrant violations of human rights, which presently go unpunished in the name of sovereignty, must be ended.

The only problem with UN enforcement of human rights is that the United Nations cannot act decisively in such a manner. Its hands are tied by the same charter that espouses the protection of human rights. Specifically, Article 2(7) of the United Nations Charter “denied authority to the UN to intervene in matters which are essentially within the domestic jurisdiction of any state. This *explicit* prohibition appeared to limit the rights of the organization to deal with alleged violations of human rights beyond discussion in the General Assembly and recommendations with regard to such violations. Furthermore, it

appeared that if any member state heeded such recommendations and acted on them against a state accused of violating human rights, a charge of illegal intervention in the internal affairs of a sovereign state could be lodged" (von Glahn 237). Unfortunately, this is the status quo of human rights within international law.

Recognizing that the internalization of the duty to enforce human rights on the part of each sovereign state would be the best case scenario, we must recognize the reality of international law. In an age where some individuals and states contest the existence and power of international law over even foreign affairs, we must realize that sovereign states will not realistically come together in the name of human rights under the banner of the United Nations. Again, such action would be the most desirable means of dealing with human rights violations, but the reality of human rights violations today is harsh. Human lives are at stake. We cannot bet their lives on the eventual cooperation of sovereign states to agree to recommendations in the sterile halls of the General Assembly. The stakes are far too high not to take real action. The power of enforcement lies in the sovereign state in the reality of today, so we turn to the state to provide the essential enforcement mechanism lacking in international human rights.

## CHAPTER III

### THE MORAL DUTY OF THE SOVEREIGN STATE

Genocide, mass graves, ethnic cleansing--these terms have become all too common in the media, perhaps to the point that one is tempted to fall prey to desensitization. Nations torture, maim and murder their own citizens, and the world stands idly by. The United Nations denounces human rights atrocities, but nothing is done beyond General Assembly discussions and declarations. Unfortunately the perpetrators of serious human rights violations are seldom moved to change their actions to conform with the rhetoric of the community of nations. One tires of the numerous human rights violations reported daily throughout the world, and many violations go unreported. In such an environment of seemingly insurmountable violations, one may be tempted to throw up one's hands in disgust. If the individual will not take action, how can the sovereign state be expected to act any differently? The question then becomes: what's one more death? The problem is that these deaths are more than one man killing another man. In the most serious violations of human rights, the lives of many are sacrificed for no reason at all.

#### **3.1 International law, sovereignty and the status of human rights**

Unequivocally, the Universal Declaration of Human Rights has made great strides in the name of human rights. Professor von Glahn appraises the situation prior to the Universal Declaration and the focus on citizens as bearers of rights:

Before the twentieth century, the virtually universal belief prevailed that the treatment of its citizenry by a state fell outside the province of international law, in as much as the individual, alone or collectively, was merely an object and not a subject of the law of nations. Since World War I, however, the community of nations has become increasingly aware of the need to safeguard the minimal rights of the individual. In consequence, human rights have become a matter of vital and, at times, acrimonious concern to the

traditional subjects of international law, and the individual has begun to emerge, to some extent at least, as a subject of the law (von Glahn 235).

The focus on the individual within the international community is vital to the acceptance of human rights.

The Universal Declaration emerged from a communal notion of rights. Human rights began with the guarantee of certain religious rights to minority groups within a population of states. The notion of human rights then broadened: “The broader concerns with the rights of human beings to life, liberty, and also equality before the law were mostly unformulated politically and legally until last decades of the nineteenth century, being bound up with the emergence of democratic forms of government” (von Glahn 235). It is important to note, however, that although human rights are often linked to democratic governments, a democracy is neither a necessary nor sufficient condition for the establishment of human rights. Democratic governments exist which violate human rights, and human rights are violated by non-democratic nations. This distinction is essential in applying the responsibility to respect human rights to all states, regardless of government structure. Peter Berger argues that it is necessary to “reject those claims of right that owe their origins to Western values, and, in effect, to ignore even those rights incorporated in international legal instruments that cannot pass the test of cultural resonance” (Falk 143). This explains why Berger considers only the “grossest violations” of human rights in his formulation. Again, if there is any hope of progress in the arena of human rights, agreement on a starting point is essential. Using only the most extreme violations of human rights without reference to Western ideals or democratic governments insures a neutral baseline for enforcing human rights.

Before formulating the means of enforcing human rights, one must understand why inaction is the norm even when human rights atrocities come to light through the media or intelligence reports. Why is there no collective or individual action by sovereign states and the United Nations? The reason is state sovereignty and the duty of non-interference in international law. Although the United Nations Charter clearly establishes provisions for the protection of human rights, Article 2(7) has successfully countered the possibility of any real action on behalf of human rights. Unfortunately, the UN Charter references to human rights provide little real opposition to Article 2(7). The UN Preamble provides that “members are ‘determined . . . to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women’” (von Glahn 237). Article 1 notes “among the purposes of the organization, the ‘promoting and encouraging [of] respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language or religion’” (von Glahn 237). Article 55(c) “commits the United Nations to promote ‘universal respect for, and observance of, human rights and fundamental freedoms’” (von Glahn 237). Article 56 “represented a pledge by all member states to take joint and separate action to achieve the purposes outlined in Article 55” (von Glahn 237). Finally, Article 68 “sets up a commission for the ‘promotion of human rights’” (von Glahn 237).<sup>6</sup>

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<sup>6</sup> In addition to the United Nations Charter, the Universal Declaration of Human Rights, adopted by the United Nations General Assembly on 10 December 1948, states in the Preamble: “. . . the General Assembly, Proclaim this Universal Declaration of Human Rights as a common standard of achievement for all peoples and all nations, to the end that every individual and every organ or society, keeping this Declaration constantly in mind, shall strive by teaching and education to promote respect for these rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition and observance, both among the peoples of Member States themselves and among the peoples of territories under their jurisdiction” (Pojman 657).

The problem is that Article 2(7) of the United Nations Charter “denied authority to the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state” (von Glahn 237). The United Nations essentially tied its hands and the hands of its member states in prohibiting interference in the affairs of other sovereign states. The intent of Article 2(7) was to prevent war and illegal territorial invasions, but the article did little to provide for human rights violations within a state’s borders. Sovereign states dared not violate this international duty of non-interference for fear of retribution by the community of nations: “This *explicit* prohibition appeared to limit the rights of the organization to deal with alleged violations of human rights beyond discussions in the General Assembly and recommendations with regard to such violations. Furthermore, it appeared that if any member state heeded such recommendations and acted on them against a state accused of violating human rights, a charge of illegal intervention in the internal affairs of a sovereign state could be lodged” (von Glahn 237). In addition to retribution by the community of nations, sovereign states have also feared that their own borders would no longer carry the sanctity of non-interference: “Governments seem wary that the sword used against others today could be turned against them tomorrow” (Falk 153-154).

Despite the state’s fears of retribution by other sovereign states and the United Nations, something must be done. Given the status quo of human rights violations, the need for action cannot be disputed. This action must involve intervention. The hesitancy of the United Nations to become involved in essentially domestic affairs is no longer an excuse for standing idle in the face of human rights atrocities. The reality is that human rights violations are not solely domestic matters when the government either allows such grievous acts to take place or participates directly in the perpetration of such violations. In these

cases, the government must step aside to allow intervention, by force if necessary, by other sovereign states. This intervention must be strong, utilizing whatever means are necessary to mitigate the infractions of human rights. Some proponents of supreme sovereignty argue that intervention equates to a breach of peace, but humanitarian aid has proven this is not the case. The claim that such intervention amounts to a declaration of war simply is not true: "If it [intervention] is nonmilitary, for example in the form of sanctions, then it generally seems ineffectual; if it takes military forms, then it amounts to a virtual declaration of war against the target state" (von Glahn 168-9). In fact this is not the case: "The denial of human rights does not in every single instance represent a threat to international peace, contrary to what the United Nations tends to assume in cases selected arbitrarily by itself" (von Glahn 237). Hence, war is not an inevitable result of intervention in a sovereign state in the name of human rights.

Intervention must be the response to serious violations of human rights if even Berger's "grossest violations" of human decency are to be avoided. As Richard Falk notes below, the problem with human rights in the current context of international law is that there is no need for sovereign states to take human rights seriously. The perpetrators of human rights violations sign off on human rights declarations, while those who clearly intend to comply do not sign: "Some governments have an interest in subscribing to the norms [of human rights] even when there is absent any serious intention to comply, and vice versa: some have an interest in avoiding subscribing even when their intention to comply is evident. In the former case, the absence of any *real* enforcement prospect makes it feasible to give lip service to human rights, while in the latter case the *theoretical* possibility of enforcement inhibits certain governments from regarding human rights as binding rules of

international law (Falk 33). The only means to deal with the differential between real and theoretical enforcement of serious human rights violations is to provide real enforcement as a duty of the sovereign state.

### **3.2 Gewirth and the Principle of Generic Consistency**

Referring to Alan Gewirth's explanation of a right, there can be no real possession of a right unless the respondent respects the establishment of a right. Gewirth's supreme principle of morality is the Principle of Generic Consistency (PGC): "This principle requires of every agent that he must act in accord with the generic rights of his recipients as well as of himself, i.e., that he fulfill these rights" (Gewirth Human Rights 219). Gewirth explains further, "The generic rights are rights to the necessary conditions of action, freedom and well-being, where the latter is defined in terms of the various substantive abilities and conditions needed for action and for successful action in general. The PGC provides the ultimate justificatory basis for the validity of these rights by showing that they are equally had by all prospective purposive agents, and it also provides in general for the ordering of the rights in cases of conflict" (Gewirth Human Rights 219-220). Thus in the case of conflicting rights, where one moral right can be fulfilled only by the infringement of the other, "that right takes precedence whose fulfillment is more necessary for action" (Gewirth Human Rights 220). For example, if two prisoners are being interrogated, and one must lie in order to save the life of the other, the PGC hierarchy of rights requires that precedence be given to the right to life. The prisoner who must lie to the guards has a right to avoid lying, but the right to life is superior to the obligation not to lie, so Gewirth's PGC allows for justifiable infringement of rights.

Gewirth's formulation of right using generic rights underscores the necessity of communal action in the face of serious human rights violations. Gewirth defines generic rights as those "rights to the necessary conditions of action, freedom and well-being, where the latter is defined in terms of the various substantive abilities and condition needed for action and for successful action in general" (Gewirth Human Rights 219). What about competing duties, such as the duty of non-interference and the duty to preserve life and human rights? In such conflicts, the Principle of Generic Consistency provides a Kantian justification for the validity of generic rights in that the rights are possessed equally by all moral agents.<sup>7</sup> In the case of a conflict between rights, such as the right to sovereignty and the right to human rights, infringement is clearly necessary. In such a case, Gewirth prescribes that the "right takes precedence whose fulfillment is more necessary for action" (Gewirth Human Rights 220). In the case of human rights, the right to sovereignty would have to be infringed in order to preserve the right to life, as is the case where serious violations of human rights are involved. It is more necessary for action to violate sovereignty because human lives would be lost otherwise.

In all examples where sovereignty conflicts with human rights, one must refer to the moral agency of those purporting to possess the human rights: "Just as the law consists of the body of laws in force in some legal systems, so morals consist of the body of moral reasons applicable to, although not necessarily accepted by, a set of moral agents. And just as legal rights must be grounded on one or more laws, so any moral right must be grounded

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<sup>7</sup> Kant's universalization principle requires that one universalize his intended action to all of mankind as desirable before performing that action. Kant also required that one treat others as ends in themselves rather than as means to an end: ". . . equal respect must be paid to the personhood of all human beings" (Harris 157).

on one or more moral reasons” (Wellman 48). In Kant’s moral theory, the categorical imperative provides such a moral reason; for Gewirth, the Principle of Generic Consistency acts as the moral foundation.<sup>8</sup> In order for a person to act as a moral agent, two fundamental conditions are necessary: (1) “freedom or voluntariness, whereby a person controls or initiates his behavior by his unforced choices” (Harris 163); and (2) “purposiveness or well-being, whereby a person sets goals for herself and has the abilities necessary for achieving them” (Harris 163). In the case of human rights violations, the very moral agency of human beings no longer exists. There is no freedom or voluntariness the victim of human rights violations can express, and there can be no purposiveness or well-being since that person’s very existence is threatened. In such cases, the most basic generic right of that human being have been denied.

Gewirth’s stipulates the maxim of Principle Absolutism within his theory of generic rights, “Agents and institutions are absolutely prohibited from degrading persons, treating them as if they had no rights or dignity. The benefit of this prohibition extends to all persons, innocent or guilty; for the latter when they are justly punished, are still treated as responsible moral agents who are capable of understanding the principle of morality and acting accordingly, and punishment must not be cruel or arbitrary” (Gewirth Human Rights 233). Gewirth closely parallels Kant’s categorical imperative, applying the Principle of

<sup>8</sup> Kant’s categorical imperative states, “I ought never to act except in such a way that *I can also will that my maxim should become a universal law*” (Kant Groundwork 70). At this point, it is important to distinguish between Kant’s categorical imperative and the Golden Rule, which states, “In everything do to others as you would have them do to you” (Harris 157). Kant’s categorical imperative differs from the Golden Rule in that the Golden Rule considers the subjective analysis of what one would allow to be done to him when deciding how to act towards others. Kant’s categorical imperative relies on universalization rather than subjectivism.

Generic Consistency specifically to human right violations: “*Act in accord with the generic rights of your recipients as well as of yourself*” (Gewirth Human Rights 240). Gewirth also translates the Golden Rule into his “Rational Golden Rule,” which is again the Principle of Generic Consistency, “the ultimate basis for the justification of social rules” (Gewirth Human Rights 140).

Gewirth demands the equality of all human beings, as Kant does in the categorical imperative. Gewirth explains the principle of equality within the Principle of Generic Consistency: “Since the principle requires of every agent that he act in accord with the generic rights of his recipients as well as of himself, specific rights are absolute insofar as they serve to protect the basic presuppositions of the valid principle of morality in its equal application to all persons” (Gewirth Human Rights 233). Gewirth’s explication of human rights within international law adds to Kant’s ingenious categorical imperative. Kant addresses how one should act with the categorical imperative, but Gewirth focuses on human rights as a specific concern within the international arena.

### **3.3 Kant and politics**

Armed with Gewirth’s Principle of Generic Consistency and Kant’s moral philosophy, we now have the ethical tools for human rights enforcement. Referring to Kant’s categorical imperative, one can easily understand why Kant would be interested in the politics of the sovereign state and the community of states. Kant notes, “. . . the united people not only represents the sovereign but is the sovereign” (Friedrich 129). Kant’s political writings have not received the credit they deserve because Kant’s moral philosophy and his writings on pure and practical reason often overshadow his less renowned works on perpetual peace and universal history. It is these works in addition to his work on the moral

philosophy which will provide the basis for one sovereign state to intervene in another sovereign state in the name of human rights enforcement as well as the hope for a lasting peace among states in the future.

Kant hoped for eventual world citizenship within international constitutional law: “Kant’s idea of peace within a legal world order is clearly and unequivocally derived from his legal doctrine as rooted in practical reason” (Friedrich 128). Despite Kant’s hope for such a grandiose accomplishment, he was also realistic about the near impossibility of such a feat. In the preface to Kant’s Perpetual Peace, Professor Latta of the University of Glasgow notes, “Kant is not pessimist enough to believe that a perpetual peace is an unrealizable dream or a consummation devoutly to be feared, nor is he optimist enough to fancy that it is an ideal which could easily be realized if men would but turn their hearts to one another. For Kant perpetual peace is an ideal, not merely a speculative Utopian idea, with which in fancy we may play, but as a moral principle, which ought to be, and therefore can be, realized” (Kant Perpetual Peace vi).

In this passage, Professor Latta notes the contrast which plagues international law today and in Kant’s day. Surely we must strive to attain world peace, but we must be realistic enough to realize the nature of such a task. Kant embraces the problem of sovereignty and concludes that as long as nations are independent, there can be no real enforcement of international law: “Kant demonstrates the hopelessness of any attempt to secure perpetual peace between independent nations. Such nations may make treaties; but these are binding only for so long as it is not to the interest of either party to denounce them. To enforce them is impossible while the nations remain independent. ‘There is,’ as Professor Ritchie put it (Studies in Political and Social Ethics, p. 169), ‘only one way in

which war between independent nations can be prevented; and that is by the nations ceasing to be independent” (Kant Perpetual Peace vii). In the interest of developing a perpetual peace, Kant recognizes the need to abridge sovereignty.

First, Kant will establish perpetual peace as a duty, an obligation we must perform: “We must desire perpetual peace not only as a material good, but also as a state of things resulting from our recognition of the precepts of duty” (Kant Perpetual Peace ix). Using the categorical imperative, the state must act so that its action could be universally accepted by all other states and the citizens therein. Applying the categorical imperative to human rights, a nation which violates its citizens’ human rights is in violation of Kant’s categorical imperative. Clearly the perpetrator of human rights violations cannot will that all states and their citizens violate human rights because such an action would result in direct personal harm and an unacceptable state of affairs, where no one has a right to anything. Kant demands that states recognize perpetual peace as a duty. Where a sovereign state perpetrates serious violations of human rights, other sovereign states must intervene as a matter of duty.

Kant recognizes that such action may not be easy, but it is necessary. Kant notes, “Nations are now-a-days slow to intervene in the interests of humanity: they are in general constrained to do so only by strong motives of self-interest, and when these are not at hand they are said to refrain from respect for another’s right of independent action. Actually a state which is actuated by less selfish impulses is apt to lose considerable more than it gains . . .” (Kant Perpetual Peace 93-94). Given the current status of human rights within international law, nations must leave self-interest behind and intervene on behalf of humanity.

### 3.4 The principle of sovereignty forfeiture

Some critics of Kant may perceive moral law as unnecessarily strict. Robert C. Solomon holds such a view: “There is no bending to fashion or cultural differences, to different times or different sentiment. Because morality is a function of reason, what defines our actions are the principles upon which they are based and because reason is by its very nature objective and universal, those principles are not just our own personal (or ‘subjective’) maxims, but universal laws which define *duty*” (Solomon 38). The refusal of Kant’s categorical imperative to bend to fashion or cultural differences is its strength in the arena of human rights. There must be a line in the sand where serious violations of human rights are involved. The international community and each sovereign state must unequivocally condemn serious human rights violations as wrong. As long as there is no real enforcement of human rights, nations perpetrating human rights atrocities will continue to sign meaningless United Nations agreements and resolutions regarding human rights, then return to their home country and continue violating human rights unabated.

The solution to resolving the status quo violation of human rights is to not only allow, but to require that each sovereign state must, as a matter of duty, intervene in a nation perpetrating serious human rights violations. *When a nation grossly violates human rights, that nation forfeits its sovereignty to the extent necessary for other nations to rectify the status of human rights in that nation.* Such a position may appear to be too strong, but there is no other way to insure the protection of human rights. The American Heritage Dictionary defines “forfeit” as “something surrendered as punishment for a crime, offense, error, or breach of contract” (Berube 525). On the individual level, forfeiture applies to the theory of respect for persons: “The principle of forfeiture says that, if I treat others as mere

means, I forfeit my rights to freedom and well-being. I do not necessarily forfeit all of my rights, but in general my rights are forfeited in proportion to the right of others I trespass” (Harris 164). The principle of forfeiture is often applied to capital punishment, where the state justifies executing a convicted criminal, who forfeits his right to life by brutally killing others. The principle of forfeiture also operates at the state level. If the state violates its citizens’ human rights, then the state must be held accountable for such actions. The state forfeits its freedom by virtue of perpetrating human rights violations.

The possibility of human beings possessing human rights in any real sense of the word returns to Alan Gewirth’s definition of right as a relationship between the right-holder and the respondent possessing a correlative duty. Carl Wellman notes this relationship, ““To say that a person has a right is to say that at interest of his is sufficient ground for holding another to be subject to a duty . . .” (Wellman 49). Based on this understanding of possession of rights, a correlative duty must be imposed to enforce human rights: “What is essential to a duty-imposing reason is that it is a reason for an agent to act or not to act in some specific manner *and* for others to react negatively to that agent in the event that he acts contrary to that reason” (Wellman 49). Hence, man will never possess human rights on an international level unless states recognize their duty to enforce those rights. Until enforcement by the sovereign state is a reality, human rights possession will continue to depend on what national borders surround a human being. There will be no sense in which men possess the right not to be killed or tortured unless one is fortunate enough to be within a state recognizing such basic human rights.

Kant defines the law as the coexistence of preferences: ““The law is therefore the totality [Inbegriff] of the conditions under which the arbitrary preferences of one may

coexist with the preferences of another according to the general law of freedom” (Friedrich 127). Clearly, those whose human rights are violated have no stake in this determination of preferences, so others must intervene on their behalf. There can be no coexistence of human rights where the human rights of even a few are forfeited. Using Gewirth’s Principle of Generic Consistency, forfeiture on the state level can be justified. A state is inconsistent when it violates the rights of its citizens; this inconsistency justifies the forfeiture of state freedom. State perpetration of human rights violations equates to an inconsistency because the state has a duty to protect its citizens. At the most basic level, citizens must be able to depend on the state for protection of their existence. Violation of human rights violates this basic obligation of the government, and an inconsistency emerges; hence, Gewirth’s PGC is violated. This inconsistency justifies the forfeiture of sovereignty.

Kant advises that the law be formulated with the categorical imperative: “A law thus is a proposition which contains a categorical imperative, or rather which contains a command in keeping with and derived from the categorical imperative” (Friedrich 127). Hence, the argument that sovereign states must intervene in other sovereign states in the name of human rights must also conform to the formulation of the categorical imperative. In applying Kant’s categorical imperative to the forfeiture of sovereignty, Dr. Harris provides a very useful division of the categorical imperative into the universalization principle and the means-end principle. The universalization principle states: “An action is right if you can consent to everyone’s adopting the moral rule presupposed by the action” (Harris 158). The means-end principle states: “Those actions are right that treat human beings whether you or another person, as an end and not simply as a means” (Harris 162). The forfeiture of sovereignty must pass both of these tests in order to properly draw on

Kant and the categorical imperative as a basis. First, applying the universalization principle asks whether a nation can consent to all other nations adopting the moral rule presupposed by the action. Suppose France intervenes in Bosnia because Bosnia is perpetrating serious human rights violations against its own people. In order to intervene using the forfeiture of sovereignty rule, France must be able to consent to Bosnia and all other sovereign states intervening within its borders if France perpetrates serious human rights violations. Clearly, this should not be a problem for a sovereign state unless the state intervening is itself guilty of perpetrating serious human rights violations.

Secondly, the sovereign state intervening must treat all human beings as ends and not merely as means to an end. Again using the example of France intervening in Bosnia, France could not refer to the forfeiture of sovereignty rule if its reason for intervening in Bosnia is to gain international prestige or for the sake of intervention alone. Realistically this part of Kant's categorical imperative may be difficult to measure when considering intervention. The key is that the state which interferes with the sovereignty of another state must only do so for the right reasons. Intervention in a state's sovereignty is a very delicate matter and can only be justified under the most stringent restrictions. Without such caution, nations could use forfeiture of sovereignty to justify any intervention, using human rights as merely a means to an end rather than an end in itself.<sup>9</sup>

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<sup>9</sup> Kant defines the law as a mutual coercive obligation: “‘law carries with it the right to coerce him who seeks to interfere with it.’ Hence, law can be seen as a mutual coercive obligation” (Friedrich 127).

### 3.5 Balancing sovereignty and human rights enforcement

The answer to enforcing human rights does not lie in wholesale denial of sovereignty. On the other hand, sovereignty can no longer be an impenetrable holy of holies, where interference in all cases constitutes a violation of international law by Article 2(7) of the United Nations Charter, denial of United Nations authority, by the United Nations “to intervene in matters which are essentially within the domestic jurisdiction of any state” (von Glahn 237). There must be a middle ground between a position that would allow for summary intervention in the domestic affairs of another state and the position that denies any possibility of intervention.

This “creative middle way” is the principle of sovereignty forfeiture, where intervention in a sovereign state is obligatory of all sovereign states if and only if there is undisputed evidence that the state is perpetrating serious human rights violations, meaning those violations explicated by Berger. Intervention is permissible where the evidence documenting serious human rights violations is reasonable, meaning there need not be undisputed evidence because inevitably someone will disagree, but if the preponderance of evidence indicates that a reasonable person would conclude that a nation is perpetrating serious human rights violations, then intervention is permissible. Intervention is impermissible where (1) the intervening nation cannot meet the criteria of the forfeiture of sovereignty rule, comprised of (a) the universalization principle and (b) the means-end principle; and (2) the intervening nation cannot meet the criteria for either obligatory or permissible intervention.

Some may argue that this is not enough, that such a position does not go far enough to protect the human rights, but limits must be imposed on permissible intervention.

Without such limits, the sovereignty of the state will have little meaning within international law. Sovereignty now poses the greatest barrier to enforcing human rights, but proper use of the forfeiture of sovereignty principle can utilize sovereignty to protect human rights, where wholesale denial of sovereignty would only result in the perpetration of more human rights violations, this time outside the bounds of government control and enforcement. State sovereignty must be used as a positive, powerful force in protecting human rights if there is to be any real enforcement of fundamental human rights.

This delicate balance must be preserved at all times, or there can be no real enforcement of human rights through the sovereignty of states. States must recognize that sovereignty is of paramount importance to not only the enforcing state, but also the perpetrating state. Hence, any forfeiture of sovereignty must necessarily take the totality of circumstances into account when considering intervention, and the final analysis of the situation will decide whether intervention is obligatory, permissible or impermissible. If intervention is impermissible, other action must be taken. The state suspecting serious human rights violations in another state cannot merely stand by idly in the face of such atrocities. The state must work to collect further information regarding human rights violations in the suspect state in addition to working through the United Nations to develop declarations and agreements to address the problem. The impermissibility of intervention through the principle of sovereignty forfeiture does not imply that there is no means to address the problem; on the contrary, forfeiture of sovereignty must be the last resort in resolving human rights violations. Working through the United Nations should be the first step in addressing international disputes, but enforcement through forfeiture of sovereignty

must be a viable option of final resort for the sovereign state, where there is an impasse in preserving human rights at the international level.

### **3.6 The future of international law**

Assuming that the principle of sovereignty forfeiture is incorporated into international law as a final remedy for serious human rights violations, the future of international law must rest on resolving issues as a community of nations. The principle of sovereignty forfeiture derives its power from the sovereignty of the state rather than the international community. The reason for relying on the individual rather than the collective is that the status quo of human rights enforcement provides example after example of atrocities allowed to go unpunished because there is real means to forfeit the United Nations self-imposed duty of non-interference in Article 2(7) of the United Nations Charter. Although this is the reality of the present, one must not extrapolate into the future. One must hope, as Kant hoped, that perpetual peace might be an attainable goal, and if not realizable as an end, at least perpetual peace is a goal worth striving for and working to attain.

Rousseau convinced Kant that the capacity of self-government must be possessed by all moral agents, that this capacity endows each agent with dignity. As the individual must possess self-government, so the sovereign state must also be master of his house, but there is a point where the individual must be subsumed under the collective: "The general will would have to be able to override the passing desires each of us feels for private goods. But, Rousseau said, 'the impulse of appetite alone is slavery, and obedience to the law one has prescribed for oneself is freedom' (Friedrich 314). Hence, the categorical imperative may seem to advocate only the forfeiture of sovereignty, but this is not really the case. The

principle of sovereignty forfeiture functions as the general will, limiting the desires of those states which would perpetrate serious human rights violations against their own.

What goal does Kant believe political philosophy must strive to attain? The answer lies in his writings on perpetual peace and universal history: “According to Kant, political philosophy must . . . build a theory of the republic into a theory of the international order of right, and the conception of the reformist improvement of right must be enriched with the dimension of a world-historical politics of peace” (Guyer 362). Kant was neither overly pessimistic nor overly optimistic. His goal of perpetual peace based on a truly international community focused on the best characteristics men possess. Kant structured the categorical imperative to draw on the good will, believing that men are basically good. In his writing, “On the Relationship of Theory to Practice in International Right,” Kant notes, “For however hard we may try to awaken feelings of love in ourselves, we cannot avoid hating that which is and always will be evil, especially if it involves deliberate and general violation of the most sacred rights of man. Perhaps we may not wish to harm men, but shall not want to have any more to do with them than we can help” (Reiss 87). Kant’s observation is as relevant today as it was in the late 1800’s. Much of the frustration and inaction in international law regarding human rights stems from the belief that nothing can be done where state sovereignty stands in the way.

Using the principle of sovereignty forfeiture provides a creative middle way between unquestioned supremacy of state sovereignty and wholesale denial of sovereignty in the name of human rights intervention. If forfeiture of sovereignty can open a portal to future resolution of international quagmires, there is hope for Kant’s community of nations and an eventual perpetual peace. Kant writes, “Peace means an end to all hostilities, and to attach

the adjective ‘perpetual’ to it is already suspiciously close to pleonasm” (Reiss 93). “Kant took political philosophy beyond the borders of states and saw its foremost object in the ‘highest political good’ of a just order of world peace” (Guyer 362). To the end of creating perpetual peace, Kant lists the preliminary articles of a perpetual peace between states:

- (1) ‘No conclusion of peace shall be considered valid as such if it was made with a secret reservation of the material for a future war;’
- (2) ‘No independently existing state, whether it be large or small, may be acquired by another state by inheritance, exchange, purchase or gift;’
- (3) ‘Standing armies will gradually be abolished altogether;’
- (4) ‘No national debt shall be contracted in connection with the external affairs of the states;’
- (5) ‘No state shall forcibly interfere in the constitution and government of another state;’
- (6) ‘No state at war with another shall permit such acts of hostility as would make mutual confidence impossible during a future time of peace’ (Reiss 93-96).

At first glance, it may seem that the principle of forfeiture of sovereignty contradicts Kant’s fifth principle in establishing perpetual peace, but this is not the case. Kant’s principles toward establishing perpetual peace cannot be attempted until all human beings possess fundamental human rights. It does no good to dissolve armies and strengthen sovereignty when the citizens within such countries continue to be tormented by the tyranny of their own governments. Kant’s perpetual peace can only be attained after the fundamental human rights of all human beings have been established.

Kant started with the individual will as the basis of morality. From the fundamental, Kant’s theory develops the basis for fundamental human rights: “If the normative implications of the right that pertains to every human being as such are completely developed, then this right is revealed to be in the end a right to peace and justice both within and between states” (Guyer 362). In his work, “Idea for a Universal History,” Kant notes the conditions under which international law may become a viable enforcement mechanism

for not only fundamental human rights but also an order of right in the general sense: “*The greatest problem for the human species, the solution of which nature compels him to seek, is that of attaining a civil society which can administer justice universally.* . . . The highest task which nature has set for mankind must therefore be that of establishing a society in which *freedom under external laws* would be combined to the greatest extent with irresistible force, in other words of establishing a perfectly *just civil constitution*” (Reiss 45-46). Kant’s hope for perpetual peace governed by an international order of right is a hope one must possess if there is to be continued progress in morality.

Kant clearly recognizes the difficulty of attaining such a perfectly just institution on the international level based on the nature of man: “. . . if he [man] lives among others of his own species, man is *an animal who needs a master*. For he certainly abuses his freedom in relation to others of his own kind. And even although, as a rational creature, he desires a law to impose limits on the freedom of all, he is still misled by his self-seeking animal inclinations into exempting himself from the law where he can. He thus requires a *master* to break his self-will and force him to obey a universally valid will under which everyone can be free” (Reiss 46). As Kant later points out, the problem is that this master must be found within the very human species which presents the problem in the first place.

Kant’s seventh proposition within his “Idea for a Universal History” recognizes the necessity of states working together before any political organization on the international level can be established: “*The problem of establishing a perfect civil constitution is subordinate to the problem of a law-governed external relationship with other states, and cannot be solved unless the latter is also solved*” (Reiss 47). Hence, Kant’s desire to establish perpetual peace must be an end goal of the principle of sovereignty forfeiture.

Enforcing human rights through intervention by the sovereign state is taken on in order to universalize the conception of fundamental human rights as an end in itself. As Kant realizes though, there can be no hope of perpetual peace until the fundamental human rights of all human beings is a reality.

“Perpetual peace, the transformation of all states into constitutionally peace-loving republics, is ‘of course an unrealizable idea.’ Kant does not expect that a stable world federation that can always ward off war can ever be attained. Nevertheless, perpetual peace is a necessary guiding idea for politics” (Guyer 363-4). The principle of sovereignty forfeiture must be incorporated into international law as an option of last resort for the enforcement of fundamental human rights. The sovereign state must carefully consider the circumstances prior to intervention in order to assess whether intervention is morally justified. Only through the denial of sovereignty is human rights enforcement possible, opening the progression of humanity toward the possibility of perpetual peace as an end goal. As Kant noted, “one can say that this universal and enduring establishment of peace constitutes not merely a part but the entire final purpose of the theory of right within the limits of reason alone” (Guyer 364).

## CHAPTER IV

### OBJECTIONS TO THE PRINCIPLE OF SOVEREIGNTY FORFEITURE

The principle of sovereignty forfeiture faces a number of challenges from defenders of what I term the principle of supreme sovereignty. The principle of supreme sovereignty holds that there is nothing superior to the state's sovereignty, meaning that there can be no justified intervention or interference in the sovereignty of another state. The principle of supreme sovereignty rests on Article 2(7) of the United Nations Charter, which "denied authority to the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state" (von Glahn 237).

#### 4.1 The political realists

The position of political realism equates to national egoism, where a state must preserve its own self-interests, and there is no higher calling. Henry Kissinger and Richard Holbrook are defenders of this position. The political realist claims that morality does not belong in international politics. Kissinger made the peculiar comment that morality gets in the way of international discourse. In The Necessity for Choice, Kissinger criticizes America's preoccupation with peace rather than the diplomatic process:

The gulf between strategy and diplomacy reduced the effectiveness of both. While we were in the phase of building strength, this separation caused us to delay defining for ourselves the kind of world for which we were striving. When we did address ourselves to the problem of negotiations, there was a great deal of talk about peace as the ultimate goal. But too frequently we seemed to have in mind a kind of terminal point at which the need for further effort would disappear. The slogan of peace was rarely coupled with an effort to give it content, thus reflecting the typical American nostalgia: since peace is the 'natural condition,' it need only be wanted; its nature being self-evident, it requires no definition (Kissinger Necessity for Choice 186).

Kissinger holds that the West, and particularly America, must not be so enamored with peace as a "natural condition." Kissinger muddles the attempt for peace with diplomatic negotiations, which are necessary, but these will rarely make any progress for peace if morality is divorced from such negotiations. Kissinger goes on to note that the condemnation of totalitarianism is little more than Western discomfort with a foreign concept: "The essence of modern totalitarianism is that it justifies itself, not as government by a minority but as the most direct expression of the popular will. Hitler's Germany, Castro's Cuba, Communist Russia and China all claim to represent the will of the people in a more direct way than Western democracy" (Kissinger Necessity for Choice 310).

Kissinger does not defend totalitarian regimes, but claims that democracy is not the inevitable outcome of social evolution: "In short, the values which are often described as the inevitable consequence of social evolution need not necessarily be reproduced in other societies with different traditions and different political structures. The notion that each citizen is entitled to an opinion in political matters or is capable of forming one is characteristic of Western political development. It is not nearly so self-evident as nineteenth-century thought assumed" (Kissinger Necessity for Choice 308). The problem with Kissinger's political outlook is not his distinction between Western and foreign traditions. The problem is that Kissinger recognizes no universal human rights. Kissinger is content to conclude that different cultures follow different traditions, and violating human rights is simply a different tradition depending on the culture.

The peculiar nature of this position stems from the fact that political realists like Kissinger and Holbrook would reject their international views if placed on the personal level. The political realists feel that there is only interference with OUR national interests if

morality is carried to the international level. Richard Holbrook made the interesting comment with respect to the Dayton Accords that there was no need to let war crimes get in the way of peace. Clearly this statement undermines the whole purpose of peace, in that there must be accountability for crimes if there is to be hope for healing the wounds of the past. Kissinger seems to contradict himself when he applauds the international system and encourages developing nations to join the international order. At the same time, Kissinger notes that disagreement over “philosophical and moral convictions” should not interfere with the maintenance of “global balance.”<sup>10</sup>

What does Kissinger suggest as a solution to the possible exploitation of Western long-term security interests? The answer is moderation: “The democracies, whatever their shifting positions, have failed to relate their philosophical and moral convictions to a coherent analysis of the nature of revolution and an understanding of how best to foster moderation. Above all, disputes among the democracies over this problem should not be permitted to turn into a kind of guerrilla warfare between allies. Whatever the merit of the individual issue, the price will be a weakening of the West’s overall psychological readiness to maintain the global balance” (Kissinger Observations 20-21). Hence, the maintenance of one’s position within the global balance is all-important in Kissinger’s eyes as well as many

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<sup>10</sup> The question which comes to mind is why bother including developing nations in a international community that does not inconvenience itself with topics other than trade and economics? Kissinger’s view seems to concern itself with little more than national interests and economics; it is no mistake that he does not mention human rights within international law. Kissinger notes, “It is clear that a world of progress and peace requires that more than one hundred new and developing nations be made part of the international system; no international order can survive unless they feel a stake in it. It is incontestable that many conflicts in the developing world arise from legitimate social, economic, or political grievances; this, however, does not exclude the possibility that these can be exploited by extremists and turned against the long-term security interests of the West” (Kissinger Observations 20).

statesmen and defenders of the principle of supreme sovereignty. Even when “philosophical and moral convictions” indicate that a sovereign state is violating the fundamental human rights of its citizenry, one must only act where there will be no disputes with fellow allies, and one’s international position is not compromised. In other words, there is no reason to risk international censure by protecting human rights in another sovereign state.

The position of the above political realists is not built on a solid foundation since the argument against morality on the international level cannot be applied to the personal level. The political realist attempts to be amoral on the international level, believing such a position will best serve his national interests, but how can one argue in good conscience that morality gets in the way of international discourse and that the prosecution of war crimes is an obstacle for peace? The separation of morality from international discourse can benefit only the tyrant and the dictator, who desire such a separation in order to free themselves from possible prosecution. If there is to be any hope of human rights enforcement, the political realists arguing for the principle of supreme sovereignty must be eliminated from the ranks of leadership. One cannot be naive enough to believe that ignoring immorality in the form of serious human rights violations will cause these problems to disappear. Such wishful thinking can only harm the existing moral structure in place, shielding the perpetrators of such violations from international prosecution.

#### **4.2 The moral and political philosophy of Hobbes**

Thomas Hobbes, who may also be placed in the ranks of those defending the principle of supreme sovereignty, cannot be dismissed as easily as Kissinger and Holbrook and other modern political realists. Hobbes’s theory has come to be termed psychological egoism, “the view that all people care only about their own welfare” (Sorell 166). One

must thoroughly understand this classification before analyzing the finer details of Hobbes's moral and political philosophy. As Kavka, a preeminent scholar on Hobbes, defined it, "Psychological Egoism shall mean Narrow Nonmaximizing Egoism, that is, the doctrine that all human actions have as their ultimate objects items . . . of personal benefits" (Kavka 44). The characteristics of Narrow Nonmaximizing Egoism include: (1) "First, genuine concern for others is usually taken as the hallmark of a nonegoistic view, it being assumed that a genuine egoist much explain away such concern, even for friends and family, in terms of narrowly self-interested motives such as display of power, hope for reciprocation and so on" (Kavka 43). This narrow interpretation of concern for others is essential for Hobbes's state of nature and the contractual obligations which emerge in the development of the state. (2) "Second, Narrow Egoism classifies desires solely by their *objects*; hence, via the hypothetical choice test it is, in principle, subject to empirical test and evaluation." . . . (3) "Third, the Wide interpretation of egoism gains some of its attraction from the misguided notion that our motivational stance must either be one of selfishness or one of impartiality with respect to the interests of all" . . . (4) "Fourth, and most important, Wide Egoism, interpreted literally, threatens to obliterate the basic distinction between altruistic and self-interested motivation" (Kavka 43).

Hobbes founds his moral philosophy on a very cynical view of human nature.<sup>11</sup> The original state of affairs is the state of nature, where everyone exercises his own self-interests

<sup>11</sup> Hobbes speaks of human nature in a general sense, realizing that on the individual level, not all human beings may conform to the state of nature: ". . . when Hobbes talks about human nature, he usually does not mean to be saying something that he thinks true of each and every human being, but only something that holds for a significant portion of the human population, viz., something that must be taken into account when constructing a workable political theory" (Sorell 166). Hobbes employs a very rational approach to human nature, concluding that all men must accept the goal of self-preservation: "That morality is

over everyone else: “Hobbes’s pessimism about the number of just people is primarily due to his awareness of the strength of the passions and his conviction that most people have not been properly educated and disciplined” (Audi 332). Hobbes sees no possibility for peaceful coexistence within the state of nature: “According to Hobbes, the basic motivation of mankind is ‘a perpetual and restless desire of power after power, that ceaseth only in death’” (Cahn 474). Realizing that such a state of affairs does not protect one’s existence and security, men will agree to enter into a covenant where they sacrifice their self-interests to establish a state capable of defending their safety and well-being:

In the state of nature every person is and ought to be governed only by their own reason. Reason dictates that they seek peace, which yields the laws of nature, but it also allows them to use any means they believe will best preserve themselves, which is what Hobbes calls *The Right of Nature*. Hobbes’s insight is to see that, except when one is in clear and present danger, in which case one has an inalienable right to defend oneself, the best way to guarantee one’s long-term preservation is to give up one’s right to act on one’s own decisions about what is the best way to guarantee one’s long-term preservation and agree to act on the decisions of that single person or group who is the sovereign (Audi 334).

The state of nature is equivalent to a constant state of war, where every man must defend himself against every other man: “Hobbes . . . goes on to argue that a state in which everyone has reason to seize power over others whenever the opportunity should offer is a state of general and perpetual war--not necessarily of continual and overt violence, but of a general will and tendency towards it. He goes on to describe ‘the incommodesies of such a war’: none of the benefits of civilization would be available, ‘and the life of man, solitary, poor, nasty, brutish, and short’” (McNeilly 169). In the state of nature, every man has a

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determined by reason and that reason has as its goal self-preservation seems to lead to the conclusion that morality also has as its goal self-preservation. But it is not the self-preservation of an individual person that is the goal of morality, but of people as citizens of a state” (Audi 331). Hence, from reason, Hobbes creates a theory of morality to take man’s passions into account for the elimination of the state of nature.

right to everything, even another man's body. That is because he has a right to do whatever he thinks necessary to his preservation, and in a state of nature there is nothing that one can use that may not be of use in preserving one's life" (McNeilly 176).

Clearly man wishes to escape from such a state, where life is "nasty, brutish and short." The alternative to the state of nature offers little for the citizen beyond the contract with all other citizens to cooperate in the commonwealth governed by the sovereign. The reality of the commonwealth is that rights and the law do not have the modern meanings one might expect. Hobbes's commonwealth is the epitome of the minimal state, meaning that the individual is entitled only to defense by the sovereign. Beyond purported self-preservation of the populace, the sovereign has no further obligations. Hobbes's peculiar view of rights and the law explains this state of affairs in the commonwealth:

'The right of nature . . . is the liberty each man hath, to use his own power, as he will himself, for the preservation of his own nature; that is to say, of his own life; and consequently, of doing anything, which in his own judgment, and reason, he shall conceive to be the aptest means thereunto.' 'Liberty,' Hobbes immediately goes on to explain, means, strictly, 'the absence of external impediments.' Now a law of nature is 'a precept or general rule, found out by reason, by which a man is forbidden to do that which is destructive of his life, or taketh away the means of preserving the same; and to omit that, by which he thinketh it may be best preserved.' *Right* and *law*, therefore, are to be clearly distinguished from each other, because right comes from liberty, whereas law obliges, and liberty and obligation 'in one and the same matter are inconsistent' (McNeilly 169-170).

In defining liberty as noninterference, Hobbes espouses a view of the state supporting only negative rights, and very limited negative rights. In Hobbes's theory, "freedom and government are antithetical, because we give up all our rights when we enter political

society, save, as Hobbes observes in his discussion of the liberty of subjects, the right to defend ourselves against the immediate threat of death and injury" (Sorell 236). One may not think there are any real repercussions to Hobbes's support of only noninterference rights in the commonwealth, but noninterference equals a death sentence where human rights are involved because the inability of an outside state to intervene on behalf of human rights will very likely result in the death of those suffering serious human rights violations.

#### **4.3 Hobbes and human rights**

Hobbes stresses the absolute sovereignty of the ruler, further sentencing the individual citizen to no hope for recourse by elevating the sovereign above reproach. Unlike Locke, there can be no hope for redress if that sovereign is a tyrant, violating the fundamental human rights of his citizens regularly. What arguments does Hobbes provide for the unlimited sovereign? (1) "First, he attempts to derive unlimitedness from supremacy (the supremacy argument). Hobbes regarded the legislative power as supreme, and also contended that sovereign powers are unitary . . ." (2) "Second is the authorization argument. A sovereign could be said to act unjustly or wrongly if he violated a covenant to the subjects" (Sorell 279). Unfortunately there will never be any wrongdoing by the sovereign: "But Hobbes contends that no covenants are made by the sovereign with the subjects. The subjects grant unlimited power to the sovereign, or at least the sovereign accepts no limits by any covenant or agreement with the subjects" (Sorell 279). The final argument for the unlimited sovereign is a semantic one: (3) "An act is termed unjust if it violates a covenant or if it violates a law. The sovereign makes the rules that define what is to be called just or unjust, right or wrong. So the subjects have no independent criterion by which to declare actions of the sovereign wrong or unjust. The sovereign cannot be unjust"

(Sorell 280). These three arguments for the unlimited sovereign coincide with arguments for the principle of supreme sovereignty. The problem is that human rights suffer if sovereigns are unjust because the supremacy of sovereignty limits the possibility of enforcing even the most fundamental of human rights.<sup>12</sup>

The sovereign is above the law in every way, allowing no checks and balances to limit his power in any way: "Leviathan is a 'Mortal God,' an all-seeing sovereign who is literally constituted by the faceless, immobile subjects of its body. . . . Hobbes himself noted that the sovereign is absolute or else there is no sovereignty at all and bluntly asserted that 'the Power and Honor of Subjects vanisheth in the presence of the Sovereign'" (Dietz 91). In addition to the supreme status of the sovereign with respect to his subjects, the sovereign is the government in all of its functions: "The sovereign is the legislator, and he is free to make and unmake laws as he thinks fit. No man can claim to be the victim of injustice at the hands of the sovereign because he has authorized everything the sovereign does, so that the 'victim' is the author of the 'injustice' which is done to him. Similarly, no subject can every lawfully punish the sovereign, since he would then be punishing the sovereign for an act which he had himself authorized" (McNeilly 232-233). The intriguing state of affairs

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<sup>12</sup> The citizen has an obligation to obey the sovereign under all circumstances except death: "He [Hobbes] says unequivocally that the obligation imposed by civil law rests on the prior natural duty to keep covenants: 'which natural obligation if men know not, they cannot know the Right of any Law the Sovereign maketh. And for the Punishment, they take it but for an act of Hostility'" (Sorell 238). Furthermore, the citizen has a duty to assist the sovereign as necessary to defend the state and execute the commands of the sovereign: "Hobbes insists that 'to covenant to assist the Sovereign, in doing hurt to another, unless he that so covenanteth have a right to do it himself, is not to give him a Right to Punish. It is manifest, therefore that the Right which the Commonwealth (that is, he, or they that represent it) hath to Punish, is not grounded on any concession or Gift of the Subjects'" (Sorell 238). Where does the right to punish come from if the commonwealth no longer allows one man to punish another even on behalf of the sovereign? Clearly this power comes from the elevated status given to the sovereign: "In the state of nature, we all have the right to subdue, hurt, or kill anyone we think we need to in order to secure our own preservation; what the covenant does is commit us to helping the sovereign to employ that right. What then distinguishes punishment from hostility is the regular, predictable, lawful, and public nature of the harm so inflicted" (Sorell 238).

within the Hobbes's commonwealth allows the sovereign to wield unlimited power on the grounds that such a position of power was agreed to by the citizens upon entering into the contract establishing the state of nature: "the very point of consent and intention, as Hobbes well appreciated, is that one *could have* done otherwise but, for whatever reason, *chose* not to do so and committed herself or himself" (Dietz 68). Hobbes's pessimistic view of human nature does not seem to concern him regarding the sovereign because the citizens could have chosen not to enter into the commonwealth. Although Hobbes describes existence within the state of nature as "nasty, brutish and short," supposedly human beings could have elected to remain in such a state of affairs. The question arises as to what happens when the sovereign exercises tyrannical control of the commonwealth, perpetrating serious human rights violations?

The answer is that Hobbes's moral philosophy leaves the victim of such atrocities without recourse since the citizen authorized the sovereign to abuse him in whatever way pleases the sovereign as long as the sovereign eliminates the state of nature. In Leviathan, Hobbes argues, "nothing the sovereign representative can do to a subject, on what pretense soever, can properly be called injustice or injury, because every subject is author of every act the sovereign does, so that he never wants right to anything otherwise than as he himself is the subject of God and bound thereby to observe the laws of nature" (Hobbes 173). It seems preposterous that one would agree to a state of affairs where his fundamental human rights will be violated by the sovereign, but this is in fact what Hobbes claims in the use of the covenant: ". . . the purpose of the original covenant is to create an authority strong enough to protect each member of the populace from the incursions of the others. Given this initial intent, any attempt to separate from the sovereign the abilities to tax, legislate, or

deploy the military to challenge or punish the sovereign's original agreement. There may be a risk that the sovereign will abuse his power; but for Hobbes . . . this risk is far outweighed by the secure and orderly existence that that power makes possible" (Cahn 474).

The conclusion Hobbes reaches through his mechanistic, pessimistic view of human nature is that without a sovereign and a contract with all other human beings, man would rape, maim and murder to further his own self-interests. The unfortunate consequence of Hobbes's sovereign is that such violations of fundamental human rights may now go on under the sanction of an untouchable sovereign, and other citizens within the commonwealth must only aid but never interfere with the desires of the sovereign since the sovereign does not directly covenant with his citizens: ". . . we appear to remain in the state of nature vis a vis the sovereign, and . . . legal relations are always . . . horizontal, holding between subject and subject, but not between subject and sovereign" (Sorell 239). From the principle of supreme sovereignty, Hobbes creates Leviathan: "By covenanting, or contracting, to lend their force to the sovereign's endeavors, they first create the conditions under which enforcement of the laws, and so too the institutions of property and justice, are possible. This is born Leviathan, the great artificial being of the commonwealth, whose very soul is sovereignty" (Cahn 474). Having covenanted to enter into the commonwealth, one cannot reconsider even if his fundamental human rights are threatened: ". . . the subject, having given up his rights, cannot now appeal to them. Moreover, the one area in which Hobbes breaks entirely with later writers on human rights is his insistence that we have no right to have a share in the sovereign authority, and that any system in which we try to set up a collective sovereign embracing many people will almost surely be a disaster" (Sorell 235).

Despite the inadequacies of Hobbes's moral philosophy to deal with human rights violations perpetrated by the sovereign, Hobbes claims to support the Golden Rule. The Golden Rule is not equivalent to Kant's categorical imperative, which requires universalization, because the Golden Rule judges whether I should perform a given action based on whether I could agree to have the same action done to me. The subjective nature of the Golden Rule clearly falls short of universalization since an objective standard is not possible. Even an attempt at universalization though would be welcome from Hobbes's moral philosophy. "Hobbes concludes that the laws of nature may be summed up in a rule which everyone accepts, the Golden Rule" (Denise 139). Hobbes argues that the Golden Rule appeals to all human beings regardless of their personal constitutions because the laws of nature demand peace: "These are the laws of nature, dictating peace, for a means of the conservation of men in multitudes; and which only concern the doctrine of civil society. . . . And though this may seem too subtle a deduction of the laws of nature, to be taken notice of by all men; whereof the most part are too busy in getting food, and the rest too negligent to understand; yet to leave all men inexcusable, they have been contracted into one easy sum, intelligible even to the meanest capacity; and that is, *Do not that to another, which thou wouldest not have done to thyself. . . .*" (Denise 139-140).

At first glance, it seems amazing that Hobbes, an egoist, would incorporate the Golden Rule into his moral philosophy, but Hobbes recognizes that one cannot pursue his self-interests without taking others into account as illustrated in the original state of nature. Hobbes condemns those that are unable to adhere to the Golden Rule: "[Adherence to the Golden Rule] sheweth him that he has no more to do in learning the laws of nature, but, when weighing the actions of other men with his own, they seem too heavy, to put them

into the center part of the balance, and his own in their place, that his own passions and self-love, may add nothing to the weight; and then there is none of these laws of nature that will appear unto him very reasonable” (Denise 139-140).

In this passage Hobbes clearly stresses the importance of the rational being in his theory. Man will not emerge from the state of nature without rational beings coming to the realization that their self-interests can be better attained through the minimal state. This appeal to rational human beings provides hope that even Hobbes, the father of egoism, may have room within the principle of supreme sovereignty for human rights enforcement. Granted, such enforcement could never interfere with the sovereign state, but there is hope that human rights could gain some attention within Hobbes’s commonwealth, where the citizens no longer have the security of their own existence because their lives are threatened by the state. Hobbes clearly supports the subject’s right to self-defense, even against the sovereign: “The obligation of subjects to the sovereign is understood to last as long and no longer than the power lasts by which he is able to protect them. For the right men have by nature to protect themselves when none else can protect them can by no covenant be relinquished” (Hobbes 179). This passage from Leviathan in combination with Hobbes’s support for the Golden Rule may afford the citizens within Hobbes’s commonwealth at least the most fundamental of human rights, the right to life.<sup>13</sup>

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<sup>13</sup> Hobbes does support the citizens’ right to self-defense as a right one does not lose when entering into the commonwealth from the state of nature. Hobbes clearly states, “The obligation of subjects to the sovereign is understood to last as long and no longer than the power lasts by which he is able to protect them. For the right men have by nature to protect themselves when none else can protect them can by no covenant be relinquished” (Hobbes 179). Hobbes does not cross the threshold Locke crosses in allowing the overthrow of the sovereign where human rights are not preserved: “Where Locke insists that we enter political society only under the shadow of a natural law whose bodies are drawn tighter by the creation of government, Hobbes relegates that law to the realm of aspiration. If the sovereign breaches it, we are not to resist but to

How can one reconcile Hobbes's denial of fundamental human rights in the name of sovereignty with his simultaneous claim that the subject, in the state of nature and the commonwealth, retains the right to self-defense? Hobbes's system must be accountable to consistency, and this may not be the case when one examines the three arguments Hobbes makes, arguments which may not be compatible: (1) ". . . as long as the sovereign preserves my life and possessions, I must assist him to retain his power. . . . Useless sacrifice is certainly useless, but readiness to take risks on behalf of the power that protects us is indispensable." (2) "I am in the last resort entitled to do whatever seems best to me to save my life. Indeed not, and probably cannot, give myself up to prison and death. I have a right to self-preservation that overrides everything I may have formerly said." (3) "But third, we cannot encourage others to resist the sovereign with us" (Sorell 240). Hobbes's arguments leaves one in a precarious position on the enforcement of human rights.

In most instances of human rights violations, the subject's life is in danger, but he cannot oppose the state through self-defense and have any real hope of success. Consider the example of Simon, a Croat in the Serbian concentration camp Omarska. In the summer of 1992, Simon was removed from his cherry garden and sent to Omarska to be brutally interrogated for months by the Serbs: ". . . he [Simon] was confined with 300 others in a garage and forced to keel, head bowed, for six hours a day. Anyone who raised his head was knocked senseless. In the evenings new guards arrived, lined people against a wall and smashed them to death. About 15 men were killed each night" (Knight 52). Simon later recalled, "'It's an indescribable sight to see men beaten to pulp, coughing blood, dying'"

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reflect that it is the sovereign whom God will call to account, not ourselves. It is an unlovely view, for it suggests all too unpleasantly that if Hobbesian subjects are told to kill the innocent, or torture prisoners for

(Knight 52). What can be done in such cases of serious human rights violations? Clearly Hobbes's theory allows only for the right of self-defense in such a scenario; however, the problem is that self-defense would most assuredly result in death. In addition to specifying very clearly the inferior position of citizens, independents, or those opposing the state in any way would be treated very poorly, allowing no possibility for citizens to voice opposition in any way: "Hobbes himself would have given short shrift to independents: if they do not obey State officials and their laws, they may be treated as enemies within the body politic and rightly treated however it is convenient for the State, its officials, and its citizens to treat them" (Kavka 415). Such a breadth of power would allow any government to efficiently dispose of those it terms dissidents under Hobbes's recommendations for independents in his theory of the state.

At this point, David Lewis put it best when he concluded, "Suffice it to say that the prospects look dark. I think it is time to give up and try something else" (Sosa 194). The alternative is to deny the principle of supreme sovereignty in order to provide for the possibility of at least limited intervention. Where a state violates its citizens' fundamental human rights or cannot prevent the violation of such rights within its own borders, the burden of enforcement falls to others capable of providing such protection. When Hobbes claims that fear and liberty are consistent, one must question the status of fundamental human rights within that state: "Fear and liberty are consistent, as when a man throws his goods into the sea for *fear* the ship should sink, he does it nevertheless very willingly, and may refuse to do it if he will: it is therefore the action of one that was *free*; so a man sometimes pays his debt only for *fear* of imprisonment, which, because nobody hindered

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information, they will do so without much hesitation" (Sorell 237).

him from detaining, was the action of a man at *liberty*" (Hobbes 171). Hence, in joining Hobbes's commonwealth, man willingly accepts the possibility that his fundamental human rights will be violated. How can one not question Hobbes's theory in the light of such assertions? When human beings can no longer depend on the state for the protection of their fundamental human rights, that state is unable to fulfill its obligations to the populace and must accept outside intervention to rectify the situation.

#### **4.4 Hobbes, Kant and the hope of peace**

Hobbes speaks little of states other than the commonwealth and the mechanics of the sovereign and the subjects. Hobbes largely ignores international relations, severely limiting Hobbesian political theory: "Save for treating foreign powers as creating a need for coordinated defense, it [Hobbes political theory] basically ignores international relations" (Kavka 438). There may be some hope for Hobbes within international law based on his desire for peace: "To summarize Hobbes's system: people, insofar as they are rational, want to live out their natural lives in peace and security" (Audi 334). Hobbes did hope for peace within his moral philosophy: "In *Leviathan*, Hobbes wrote that 'all men agree on this, that Peace is Good, and therefore also the way, or means of Peace, which (as I have showed before) are *Justice*, *Gratitude*, *Modesty*, *Equity*, *Mercy*, and the rest of the laws of Nature, are good; that is to say, *Moral Virtues*; and their contrary *Vices*, Evil'" (Dietz 101). Hobbes goes on to stress peace as the goal of the state: "The aim of the State is for him as a matter of course peace, i.e. peace at any price. The underlying presupposition is that (violent) death is the first and greatest supreme evil" (Strauss 152).

Hobbes further stresses the need for peace in his fundamental law: "The fundamental law commands us to seek peace, and the other laws point the way to that end"

(McNeilly 191). Furthermore, “The second law of nature is ‘derived,’ Hobbes says, from the fundamental law, and it is ‘that a man be willing, when others are so too, a far-forth, as for peace, and defense of himself he shall think it necessary to lay down his right to all things; and be contented with so much liberty against other men, as he would allow other men against himself’” (McNeilly 192). Hobbes cannot be blamed for desiring peace, a desire similar to Kant’s longing for a perpetual peace: “Peace, of course, is to be sought because it is the condition of the effective promotion of values . . .” (McNeilly 192). The problem with peace within Hobbes’s moral and political philosophy is that peace is illusory, meaning that there may not be outright violence, but the unlimited powers of the sovereign allow the most serious violations of human rights to go unpunished within a state’s borders under the guise of a peaceful commonwealth.

Based on the inability to enforce fundamental human rights in any way under Hobbes’s principle of supreme sovereignty, unlimited sovereignty must be denied. As stressed in the principle of sovereignty forfeiture, there is no need for the wholesale denial of sovereignty to make room for human rights, but there must be a balance. In Hobbes’s moral and political philosophy, the commonwealth under the sovereign amounts to absolute sovereignty by one ruler, whether an individual or a group, amounting to nothing short of tyranny: “the fractious clash of interests that Machiavelli believed constituted politics--which could also be tempered within a properly balanced republican constitution--Hobbes took as an endlessly disruptive given of human nature. Accordingly, in Hobbes’s science, the problem is not how to temper the clash of interests and opinions within the multitude but rather how to eliminate it” (Dietz 93). Hobbes and other defenders of the principle of supreme sovereignty do not wish to balance the inevitable “clash of interests” within the

state. Without compromise within society, one cannot hope that the Hobbesian will allow compromise external to the state, so how can there be peace?

Peace inevitably involves compromise. Kant realized this in Perpetual Peace; he did not attempt to argue that perpetual peace could for the time being amount to more than a hope for the future, fully recognizing the differences in opinion between states. Hobbes promotes a paradigm of the state that everyone should be able to follow, based on his pessimistic view of human beings as self-serving creatures concerned only with their own self-preservation: “the essential relationship between men is by nature this, that each human individual is at the mercy of every other human individual” (Strauss 123). Perhaps this is the case, but one hopes that on the level of international relations, sovereign states can relate to one another for the sake of peace as more than entities serving only their own interests. The interest in the global community in enforcing human rights through United Nations agreements, resolutions and declarations represents at least some evidence that states interact for reasons other than promoting self-preservation.

Hobbes’s moral and political philosophy presents the epitome of the principle of supreme sovereignty; whereas, Kant’s philosophy provides the foundation for the principle of sovereignty forfeiture. Kant connects peace and justice and “asserts a connection between justice within the state and peacefulness between states, and organizes peace as a system for the regulation of conflicts according to the standard of requirements of justice that are acknowledged on all sides” (Guyer 363). Clearly the principles lie on opposing sides of the spectrum with regard to the weight occupied by sovereignty. In fact, the principle of sovereignty forfeiture not only allows for the importance of sovereignty, but the successful utilization of the principle rests on the sovereignty of other states for

intervention. The principle of sovereignty forfeiture relies heavily on sovereign states working through, not against the community of nations, since an intervening state has the burden of proof in providing sufficient evidence of serious human rights violations in the subject state to warrant intervention in the perpetrating state. Unfortunately, Hobbes and the principle of supreme sovereignty do not allow for intervention of any kind, so there is no possibility for compromise by the Hobbesian, only a constant state of distrust between states:

Kant's concept of peace between nations is noticeably different from Hobbes's model of peace. While Kant will attain peace by overcoming the natural condition among states by means of right, a Hobbesian seeks a strategy of merely managing the natural condition among states. His concept of peace is built on the same elements that also support the individual occupant of the natural condition in its strategy for survival: they can all be brought under the title of armed distrust, whose maxim of rationality is to be found in the acknowledgment of the justifiability of the distrust of the others. The key is to stave off war by making any breach of the condition of the absence of war so expensive that no one will rationally be able to find any profit in it. The key thought is therefore the balance of terror, for the stabilization of which a readiness for defensive armament is always necessary which, in turn, in order not to run the risk of being too late, necessarily tends toward a readiness for offensive armament; thus the balance of terror itself drives a spiraling arms race. Kant does not base the order of peace on a balance of terror, but on an order of right" (Guyer 363).

Kant directly criticizes Hobbes: "Kant calls the original social contract an idea of reasons from which the nature of human society can be deduced. He does not speak of a contract of submission, but every man is by this contract made secure in his general rights. . . . Man has therefore unalterable rights vis-a-vis the state, and the constitution has as its purpose to make this sphere of freedom secure" (Friedrich 128-129). Kant replaces Hobbes's leviathan with the categorical imperative, where each man possesses the ability to decide the morality of his actions: "Kant argued that the concepts of good will and duty,

which could be derived from ordinary consciousness, and the concept of a categorical imperative, which could be derived from popular moral philosophy, but also his own conception of humanity as an end in itself whose free agency must always be preserved and when possible enhance, all give rise to the fundamental moral principle that one should act only on maxims or polices of action that could be made into a universal law or assented to, made an end of their own, by all agents who might be affected by the action" (Guyer 16-17). Kant's system hinges on the internal goodness of man; whereas Hobbes's system sees only the evils of passions within man and argues that external enforcement through the sovereign is the only way to escape the state of nature. Interestingly, although Hobbes recognizes the need for external enforcement through the leviathan of the commonwealth covenant, he does not allow for enforcement external to the state itself in case the state as an entity violates the covenant to protect at least the most fundamental of human rights, the right to life.

In conclusion, the objections to the principle of sovereignty forfeiture do not succeed. The political realists divorce morality from international relations, and such a position benefits only the perpetrators of human rights violations. Like the political realists, Hobbes adheres to the principle of supreme sovereignty, rejecting the abridgment of sovereignty in any way. Hobbes argues against the principle of sovereignty forfeiture because he holds that the sovereign state best serves the interests of its citizens. The problem is that states which violate their citizens' fundamental human rights are not serving the interests of its citizens. Citizens in these states must be able to depend on the international community and other sovereign states. Without intervention through the principle of sovereignty forfeiture, states will continue to violate the fundamental human

rights of their citizens. Hobbes presents a strong defense of state sovereignty, but sovereignty is not absolute. Forfeiture of sovereignty is justified only to the extent necessary for the enforcement of fundamental human rights. Hence, the objections to the principle of sovereignty forfeiture do not succeed because supreme sovereignty cannot reign unchecked in the realm of serious human rights violations.

## CHAPTER V

### CONCLUSION

Human rights enforcement is an important issue within international law.

Enforcement requires sovereign states and the international community to abridge the sovereignty of states perpetrating serious human rights violations to the extent necessary to ensure the protection of the citizens' fundamental human rights. The status quo of human rights enforcement through the United Nations is inadequate. Too often little or nothing is done to protect the innocent men, women and children who suffer gross violations of their basic human rights at the hands of their own governments. Gewirth and Kant provide the foundation for the principle of sovereignty forfeiture, where sovereignty becomes a tool for the enforcement of human rights, rather than an impediment.

Hobbes recognizes the importance of state sovereignty, and he argues that the state is best able to provide for the interests of its people. This is not the case when the state violates the fundamental human rights of its citizens. There must be a balance between human rights enforcement and state sovereignty. The status quo clearly favors state sovereignty at the expense of human rights enforcement, but one must exercise great caution when utilizing the principle of sovereignty forfeiture. Sovereignty forfeiture must be a resource of last resort. Only after exhausting other means of addressing gross human rights violations must the sovereign state resort to direct intervention. When necessary, the sovereign states must intervene in states perpetrating serious human rights violations. There must be a line in the sand.

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